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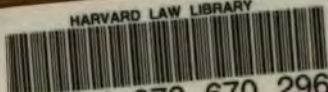
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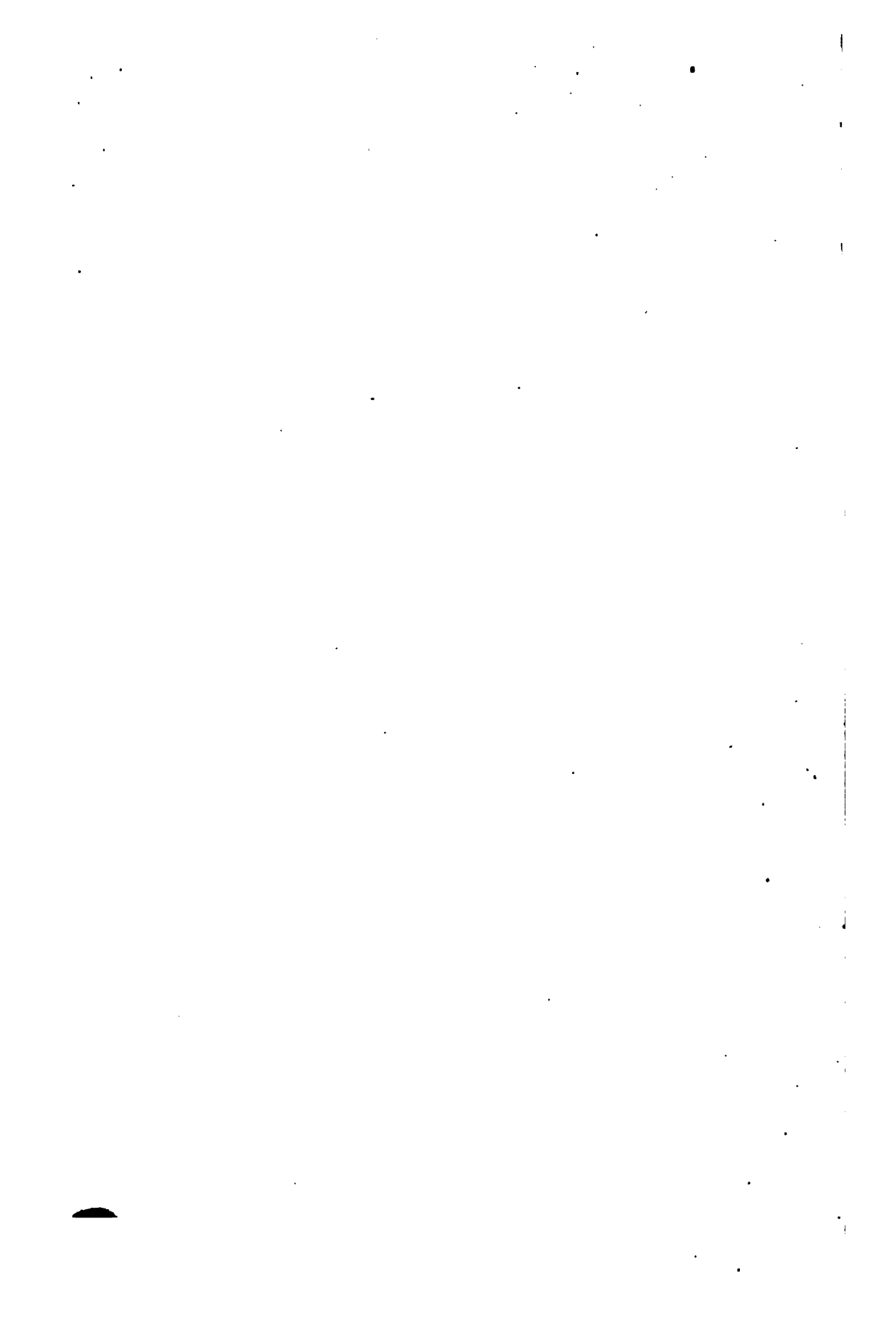


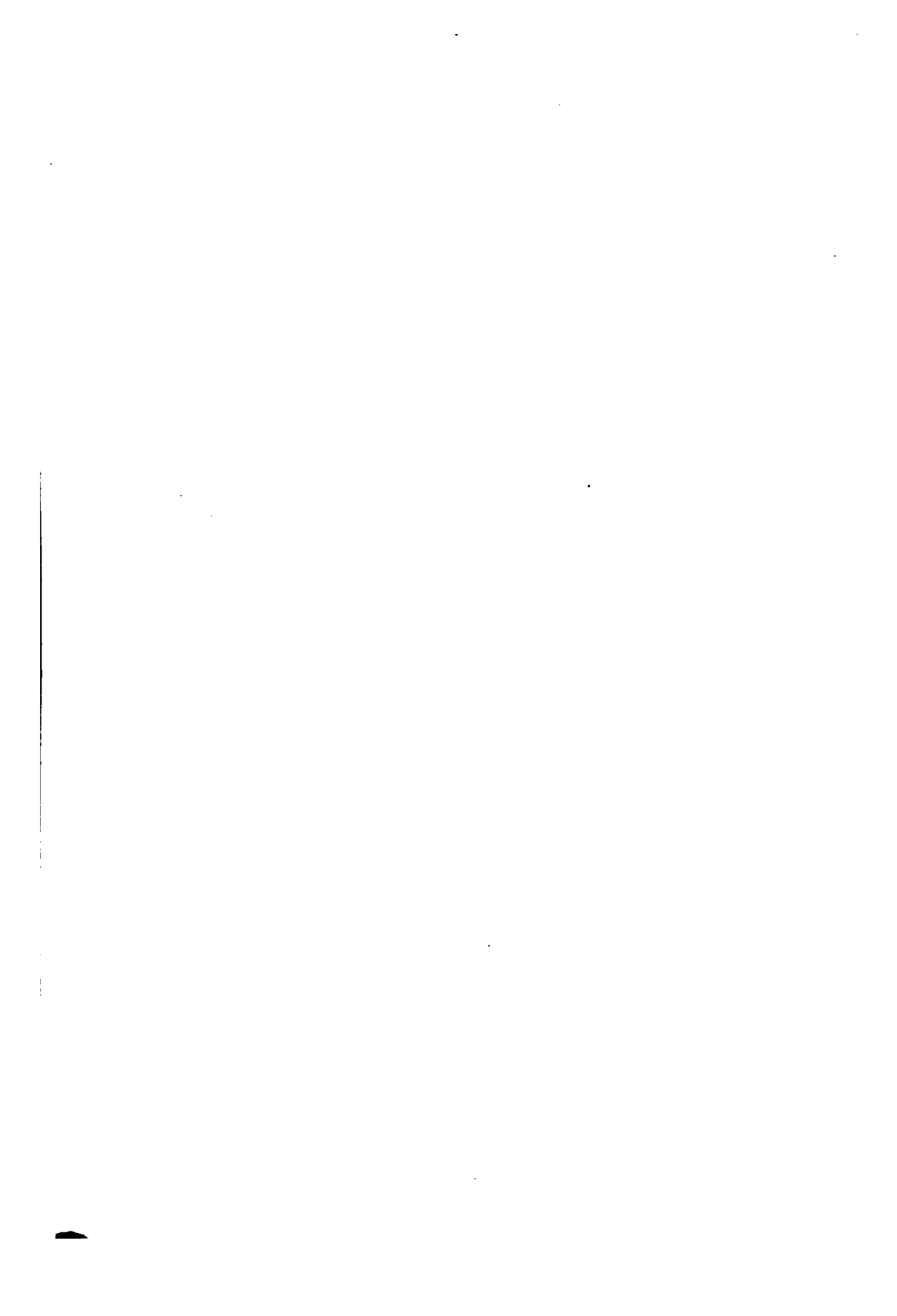
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CASES

ARGUED AND DETERMINED

IN THE

**COURT OF APPEALS OF
COLORADO**

AT THE

**APRIL AND SEPTEMBER TERMS
A. D. 1912**

E. T. WELLS
REPORTER

VOLUME 22

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MAR 12 1914

COURT OF APPEALS OF COLORADO

**REGULAR TERMS BEGIN ON SECOND MONDAY IN
JANUARY, APRIL AND SEPTEMBER**

**JUDGES OF THE COURT DURING THE TIME OF
THESE REPORTS**

TULLY SCOTT, PRESIDING JUDGE

ALFRED R. KING,	}	ASSOCIATE JUDGES.
EDWIN W. HURLBUT,		
STUART D. WALLING,		
LOUIS W. CUNNINGHAM,		

JAMES R. KILLIAN, CLERK.

A. W. GRANT, CHIEF DEPUTY CLERK.

BENJAMIN GRIFFITH, ATTORNEY GENERAL.

EBENEZER T. WELLS, REPORTER.

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REPORTS
OF THE
DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO

APRIL TERM, 1912.

[No. 3354.]

COLORADO AND SOUTHERN RAILWAY Co. v. BRENNIMAN
ET AL.

1. COMMON CARRIERS—*Who Are*. Railroad companies are common carriers of live stock.

2. — *Liability of*. The carrier is not responsible, in that capacity, until the goods have been delivered to him, for, and in condition for, immediate shipment and transportation, requiring no further action, or direction from the consignor, and have been accepted by the carrier. Upon such delivery and acceptance the liability of the carrier commences, and delay in putting the goods in transit, no matter for what cause or for how long, is immaterial. If a loss occurs, not occasioned by the act of God or the public enemy, the carrier is liable.

3. — *Delivery to Carrier—Acceptance*. Sending the freight to the place where the carrier is accustomed to receive freight, accompanied with notice that it is there for transportation, is a delivery, and may be sufficient to bind the carrier, as such, in the absence of objection or refusal to accept the same for immediate transportation. Formal acceptance is not required.*

4. — *Carrier of Live Stock—Duty*. A railroad company carrying live stock is under duty to provide good and sufficient pens for receiving, loading and unloading live stock, not only at the

*Syllabus by King, J.

station of receipt and delivery, but where stock *en route* are to be fed, or where they are delayed; and it is liable for losses occasioned by its failure to provide such facilities.

The liability is the same, whether the railway company maintains these facilities, or employs another to discharge their duty, or adopts the yards and pens of another as a part of its system.

5. — *Contract Limiting Carrier's Liability*, is without effect where executed after the defaults which occasioned the loss complained of, no purpose to give it retrospective effect appearing.

6. — *Contract Construed*. The contract pleaded by the railway company in defense to an action for losses of live stock attributed to its defaults, provided that "claims for loss or damage from any source shall be presented within ten days from the date of unloading said stock at destination." Held unreasonable to apply this provision to losses or damage occasioned by the railway company's defaults prior to its execution.

A clause in the bill of lading waiving and releasing all causes of action under any prior verbal or written contract is unreasonable and void.

7. *APPEALS—Verdict on Sufficient Evidence*, binds the court of review. The evidence will be viewed in the light most favorable to the successful party.

8. *NEW TRIAL—Documentary Evidence Newly Discovered*. Where the application for a new trial is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear.

9. — *Diligence*. In an action by consignor of live stock against a railway company, second in the line of transit, for losses attributed to negligence in caring for the stock, the question being whether, at the time the neglects complained of occurred, the defendant had accepted the animals for carriage, a new trial will not be awarded on account of the recent discovery of the contract of the first company in the line of transit. Ordinary caution required counsel to seek for and procure this evidence prior to the trial.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

MR. E. E. WHITTED, MR. R. H. WIDDICOMBE, for appellant.

MESSRS. GARBUTT, CLAMMER AND SARCHET, for appellees.

KING, J., delivered the opinion of the court.

Appellees as plaintiffs below brought suit against appellant alleging that on the 29th day of October, 1906, plaintiffs, the owners of 1,260 head of sheep, shipped said stock from Chama, New Mexico, over the road of The Denver and Rio Grande Railroad Company to Denver, Colorado, consigned to themselves, and that these sheep, together with the way bills, were delivered to the defendant company at Denver on November 1st, 1906; that plaintiffs then and there requested defendant to forward said stock without delay to Giddings, a station on defendant's railroad near Fort Collins; that defendant accepted the way bills, took the sheep into its possession, and agreed to make the shipment as requested; that defendant failed to make prompt shipment, and kept the sheep in muddy, filthy and insufficient pens, with inadequate facilities for feeding, where the feed was trodden underfoot and wasted, so that the sheep received no benefit therefrom, and in which they were exposed to inclement weather, by reason of which 160 sheep, of the value of \$424, died, and the rest shrank in weight, and deteriorated in value to the amount of \$125. Other damage was alleged but withdrawn from the jury.

Defendant pleaded (1) a general denial; (2) that the sheep were shipped to Denver, and there delivered to The Denver Union Stock Yard Company by which they were retained until November 4th, when they were received and loaded by the defendant, and shipped to Fort Collins; that the said

stock yard company was not an agent of the defendant; that defendant had nothing to do with said sheep until received by it on the 4th of November; that any delay in shipment was caused solely by the absolute inability of the defendant to procure cars; (3) that the shipment named in the complaint was received by the defendant on November 4th, and transported under a certain written agreement known as a "Limited Liability Live Stock Contract," entered into on said date between plaintiffs and defendant, by which plaintiffs' claims were released and discharged.

The reply, after denying other affirmative allegations of the answer, admitted the execution of the contract, but denied that the claim of plaintiffs in this case is controlled by said agreement, and sought to avoid the conditions set forth in the 13th, 15th and 21st paragraphs of said contract, by alleging that the written notice of loss required by paragraph 13, was given as soon as possible after learning the extent of the damage; that suit was begun within ninety days after the happening of the injury, as required by paragraph 15, and denying the waiver or release provided for in paragraph 21. Paragraphs 13 and 21 of said contract are as follows:

"13. All claims for loss or damage from any source shall be presented to the carrier within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock; otherwise, such claims shall be deemed to be waived, and the carriers shall be discharged from liability. Any carrier liable on

account of loss or damage to any of said stock, shall have the benefit of any insurance thereon."

"21. As a further consideration for the reduced rate herein given, the shipper hereby releases and waives any and all causes of action for damages, or otherwise, by reason of any written or verbal contract for the shipment of said cattle, or any of them, prior to the execution hereof."

The cause was tried to a jury upon instructions given by the court which practically eliminated the written contract from consideration, and denied its applicability to the cause of action, and placed the obligation, duty and liability of the defendant as at common law—that of practical insurer of the freight, after it was received and accepted by the defendant as a common carrier; and charged that in case the jury found that upon the day following the arrival of the sheep in Denver, the agent of The Denver and Rio Grande Railroad Company delivered to the defendant company the bills of lading of said sheep, and that the sheep were accepted by the defendant at the stockyards for shipment, and were at that time ready for shipment, the defendant must, in law, be deemed to have accepted and received the sheep on the day it received the way bills or bills of lading from The Denver and Rio Grande Railroad Company; and further, in effect, that failure of plaintiffs to present claim for loss or damage within ten days from the unloading of the stock at its destination, as required by said paragraph 13, would not bar plaintiffs' claim if the same was presented within a reasonable time after the amount of the loss had been ascertained, in case the jury should further find that the lapse of time did not

prejudice the rights of the defendant. (Instruction No. 2.)

The grounds of error relied on in the briefs of counsel for appellant are as follows: 1. Appellees were not entitled to have the cause as made submitted to the jury, for the reason; (a) that appellant was not responsible nor liable for the condition of the stockyards; (b) appellees were precluded from asserting their claim, because made too late. 2. The court erred in the instructions given, namely, instructions 2, 3 and 4. 3. The court erred in refusing to give instructions requested by appellant. 4. The motion for a new trial was erroneously overruled.

The principal evidence upon the questions herein to be considered was given by F. F. Breniman, brother of one of the plaintiffs, who accompanied the shipment, and by T. J. Burns, agent at the union stockyards for the defendant company. The shipping contract between The Denver and Rio Grande Railroad Company, initial carrier, and the plaintiffs, was not in evidence. Breniman testified that the sheep were billed over the Denver and Rio Grande railroad from Chama, New Mexico, to Fort Collins, Colorado; that they arrived in Denver about eight o'clock on the evening of October 31st; that he went to the office of the initial carrier to see if the sheep could be sent on immediately to Fort Collins, and was told by the agent of that company that they would be turned over to the defendant company; that said agent notified the defendant's agent, who declined to receive the sheep that evening on board cars; (the reason, as admitted by counsel for both plaintiffs and defendant, being that the sheep

had been on board the cars at that time for twenty-eight hours without feed or water, and, under the federal statute, must be unloaded); that said sheep were sent to the Union Stockyards and unloaded. About ten o'clock November 1st witness went to the office of the defendant at the stockyards and asked the agent when the sheep would be shipped, the agent replying that he thought about five o'clock on that day. About five o'clock witness was told by said agent that they would go out on the ten o'clock train, and later, that they would go about twelve o'clock, then at three in the morning, and at this time witness was told to go to bed and he would be called. Next morning (Nov. 2) witness again saw the agent, who then told him that the sheep had not been loaded because the bills of lading had not been turned over by The Denver and Rio Grande Railroad Company. Witness then got the agent of that company and accompanied him to the defendant's office and found that the bills of lading had been delivered to and were in the hands of defendant's agent, who then told witness that the sheep had not been billed out, and even if the bills were there, would not have been billed, because witness had not ordered the sheep loaded; that if no one had been with the sheep they would have been shipped, but where they were accompanied it was expected that the man in company would order them loaded; witness then ordered cars, and that the sheep be loaded: admitted that he knew there was a general shortage of cars, but testified that nothing was said to him at that time about shortage, and he did not know there was a shortage for that shipment.

Burns, defendant's agent, could not remember

when the bills of lading were received by him from the initial carrier. He testified that it was not usual for the initial carrier to deliver bills of lading, but to give a transfer sheet, although sometimes the receiving road would take the way bills in order to save time. His way bills showed that he had received the bills from the initial carrier; that shipment had been made over the Denver and Rio Grande from Chama, New Mexico, consigned to plaintiffs at Fort Collins with final destination at Omaha, under a through rate with "feed in transit" provisions, but not on a through contract. He testified that it was the custom of the yardmaster at the stockyards, upon arrival of stock billed to points beyond, to post a bulletin showing the fact of arrival, place of shipment, consignee, route and destination; that each road had its separate bulletin, and that he supposed such a bulletin was posted November 1st showing the shipment in question, and that he saw it; that the reason for delay in shipment was a shortage of cars, and the fact that plaintiffs' agent accompanying the sheep did not order them loaded. It was shown that several railroad companies, including the defendant and the initial carrier, had agencies and offices at the stockyards, and received and discharged live stock at that point; that there was a rush of business at that time, and the stockyards were crowded; that the sheep were confined, without shelter, in open pens in cold and stormy weather, and the yards deep in mud without facilities for feeding; that upon arrival at Fort Collins 12 of the sheep were dead, and the others so weak that many of them had to be hauled to the feeding pens, and that within a few days 160 of

them died and a number more later. The purpose of plaintiffs was to feed and fatten the sheep at Fort Collins before proceeding to the final destination named. The jury returned a verdict in favor of plaintiffs.

1. In this state railroad companies are common carriers of live stock.—*Railway Co. v. Rainey*, 19 Colo., 225. "The general rule maintained by all the authorities is that carriers of live stock are liable absolutely for loss of or injury to stock intrusted to them for transportation, like other common carriers, unless the loss or injuries were occasioned by the act of God, or the public enemy, or the negligence of the shipper, except that they are not liable for loss or injury caused by the "proper vice" or natural propensities of the animals themselves, and not by any negligence on the part of the carriers."—Moore on Carriers, p. 509; *Railway Co. v. Rainey, supra*. But, the authorities are uniform in holding that the carrier is not responsible, *in that capacity*, for goods, until they have been delivered to the carrier for immediate shipment, in condition for transportation, and requiring nothing further to be done by, and no further orders from, the consignor, and the goods have been so accepted by the carrier.—Elliot on Railroads, sec. 1409, 2nd ed.; Hutchinson on Carriers, sec. 113, 3rd ed.; Moore on Carriers, p. 133; 6 *Cyc.*, p. 614. To effect such a delivery to the carrier there must be, either actually, or in legal effect, a complete surrender to it of possession and custody, and as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and, until this has been done, it cannot be

said that the carrier has assumed any responsibility for the goods, as carrier.—Hatchinson on Carriers, sec. 72, 73, 1st ed.; Moore on Carriers, p. 133. The question of delivery and acceptance for *immediate* shipment does not seem to be controlled, nor to any considerable extent affected, by the fact that there may be, or is expected to be, some delay on the part of the carrier in placing the goods *in transitu*, unless for that reason the carrier declines to accept the goods for shipment until some future time, and thereby its liability, if any, becomes that of warehouseman instead of carrier. The rule in that respect seems to be fairly stated in *Railway Co. v. Murphy*, 60 Ark., 333, 338, quoted as authority by counsel for both plaintiffs and defendant, and being as follows:

“When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, *eo instanti* the liability of the common carrier commences. When this occurs the delivery is complete, and it matters not how long, or for what cause, the carrier may delay putting the goods *in transitu*; if a loss is sustained, not occasioned by the act of God, or the public enemy, the carrier is responsible. But, on the contrary, as there is no divided duty of safe keeping, and no apportionment, in the event of loss, between the owner and the carrier, the surrender of control over the goods by the shipper must be such as to give the carrier the unqualified right to put at once *in itinere*, and the carrier must have accepted them for that purpose.”

And also in Elliott on Railroads, sec. 1409, as follows:

“Railroad companies are held to the liability of warehousemen, not to that of common carriers, for goods deposited with them otherwise than for immediate shipment. Thus, if the shipment is not to begin until further orders from the consignor, or something has been done by him, the carrier’s liability attaches the instant, but not before, the orders have been given, or the something has been done. If, however, the delay in shipment is due, not to the request or default of the consignor, but to the exigencies of the railroad company’s business or to its default, the carrier’s liability usually dates from the deposit and not from the commencement of the journey. Thus, where goods bearing the consignee’s name and address are delivered to a railroad company, without agreement to the contrary, the delivery is equivalent to an express order to ship immediately; and the fact that the consignee consents that they may wait in the freight house because the company has no car ready, will not relieve it from liability as an insurer.”

It has been held that whether freight has been delivered to a common carrier so as to fix its liability as such, is a mixed question of law and fact, and delivery may be shown by proving that the freight was sent to the place where the carrier was accustomed to receiving it, and that notice was duly given that it was there for transportation.—Elliott on Railroads, sec. 1413. And, that the liability of a common carrier begins with the actual delivery to it, or with such notification as, under the usages of business, constitutes a constructive delivery.—*Id.*, secs. 1443, 1412. And when the owner of the goods has done all in his power, and all that he is required

to do by his understanding with the carrier, or the usages of the business, to further the shipment, it then becomes the duty of the carrier to do whatever else is necessary to put the goods *in transitu*, and the delivery and acceptance will be considered as complete from the time the carrier is informed that the goods are ready for it.—Hutchinson on Carriers, sec. 125; Elliott on Railroads, sec. 1404; *Illinois Central Ry. Co. v. Smyser & Co.*, 38 Ill., 354. And, that no formal acceptance is necessary.—Elliott on Railroads, sec. 1404, and cases cited. It is also held in *Houston etc. Ry. Co. v. Hodde*, 42 Tex., 467, that delivery is a question of fact for the jury. But in *Gass et al. v. N. Y. etc. R. R. Co.*, 99 Mass., 220, 96 Am. Dec., 742, it is said that delivery is a question of law where there is no dispute as to the facts.

A railroad company, as a carrier of live stock, is obliged to provide suitable and necessary means and facilities, such as good and sufficient stock pens and yards for receiving, loading and unloading live stock offered it for shipment, and for its delivery to the consignee, and for stock unloaded *en route* to be fed, or on account of delay, and is liable for damages caused to said stock by reason of the carrier's failure to provide such facilities.—Moore on Carriers, p. 500; *Covington Stock Yards Co. v. Keith*, 139 U. S., 128; *International etc. R. Co. v. McRae*, 82 Tex., 614; *Feinberg v. Delaware etc. R. Co.*, 45 Am. & Eng. R. Cas., 348; Hutchinson on Carriers, secs. 634, 638, 3rd ed.

II. Counsel for appellant in their brief say: "If there are cases in the books involving identically the same questions as are involved in the case at bar, we have been unable to find them." The

statement of counsel as to the absence of cases directly in point is confirmed by our own examination to the extent that we find few, if any, cases in which the liability of the connecting carrier has been based upon a delivery by the initial carrier, or the consignor, to a stockyard company, a corporation separate and distinct from the carriers or either of them, and which was the owner and in sole control of the pens and other facilities for feeding and discharging shipments of live stock. There are cases, however, which, from similarity of conditions involved, and by analogy, throw some light upon the subject. —*Covington Stock Yards Co. v. Keith et al.*, *supra*; *N. Pennsylvania R. Co. v. Commercial Bank of Chicago*, 123 U. S., 727. In the first case, the United States supreme court by Harlan, Justice, holds that a railroad company, holding itself out as a carrier of live stock, is under legal obligations arising out of the nature of its employment to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned; that such duty cannot be efficiently fulfilled in a town or city without the aid of yards, in which the stock offered for shipment can be received and handled with care; and, that the rights and obligations of the parties are not different, whether the railroad company itself maintains the stockyards, or employs another company or corporation to supply the facilities for receiving and delivering live stock, which the railroad company was under obligations to the public to furnish.

Upon the question of delivery the court, at the request of appellant, instructed the jury that if the stockyards where the sheep were held prior to shipment, "were not owned, controlled or operated by defendant, *and were not furnished to plaintiffs by defendant*, and that said stock was not accepted by defendant for shipment until the cars were furnished in which the sheep were loaded and shipped," under the issues, their verdict must be for the defendant; and also that mere delivery to the stockyards at Denver, by The Denver and Rio Grande Railroad Company, or its agent, was not delivery to the defendant. The evidence as to the relations between the stockyards, or the stock yard company, and the carriers, is somewhat vague, but seems to establish the fact that the stockyards was a common point used by railroad companies in Denver for delivery of stock, receipt of stock, and exchange thereof between the railroads terminating in Denver and connecting roads beyond that point, and that the pens and sheds in said yards were used by the railroad companies for the feeding of stock in transit, and it does not appear that any other pens or sheds or facilities, for loading, unloading, delivering or receiving, watering or feeding stock were at that time furnished or supplied by such carriers in the city of Denver. Therefore, there appears to have been competent evidence, legally sufficient, upon which the jury might find that the pens in which the stock was kept, were furnished by the defendant to plaintiffs, or, were by selection and adoption a part of defendant's system for shipping live stock; and, that in accordance with usage and customs of the business at that place, the sheep were delivered to

and accepted by the defendant for immediate shipment on the first day of November.

III. Plaintiffs' right to a recovery cannot be determined by the provisions of the limited liability contract, for the reason that the contract was not entered into, nor mentioned, until the fourth day of November, whereas, the alleged acts or default of defendant by which the injuries complained of were caused, occurred between the morning of November 1st and the afternoon of November 4th when the contract was signed, and there is nothing to show that the contract was, or was intended to be, retrospective in its effect, unless it be paragraph 21, which is ineffective under the circumstances. Instruction No. 2, upon the question of notice, seems to have been a partial recognition by the court of some effect to be given to the written contract. But, if the giving of that instruction was error, such error was in favor of the defendant. It would be unreasonable to hold that paragraph 13 of the contract had in contemplation notice to be given of loss or damage sustained prior to the time the contract was signed. The provisions of paragraph 21, waiving and releasing all causes of action under any prior verbal or written contract, upon respectable authority, were void. The supreme court of Arkansas in *Missouri & N. A. R. Co. v. Sneed*, 85 Ark., 293, held that it was not error in the trial court to exclude from the jury that clause of the contract which required plaintiff to give notice of damage before removal of the stock, where, as in the present case, the damage had already occurred when the contract was executed; that where the damage to the stock occurred before the contract was entered into, such

contract had no bearing upon the case, and that defendant had no right, at the time of shipment, to impose upon the shipper a contract for exemption from liability for damages which had already occurred, and cited *Railway Co. v. Burgin*, 83 Ark., 502, and *Railway Co. v. Pearce*, 82 Ark., 353, in which it was held not only that a contract made after damage occurred had no bearing upon the case, but that a contract exempting the carrier from liability for damages which had already occurred, was void, because unreasonable and discriminatory.

Excluding the written contract, the vital question became one of fact, namely: Were the sheep delivered to and accepted by the defendant on the first day of November for immediate shipment? If they were so received, the shortage of cars, as well as the relations thereafter existing between the stockyard company and the defendant, were immaterial, as the defendant was then charged with custody and care of the stock, and was liable for any damage thereto not within the exceptions hereinbefore noted. The question of delivery and acceptance was submitted to the jury upon what appear to be appropriate instructions; and, we cannot say that the evidence introduced, viewed in its most favorable light to plaintiffs, was insufficient to justify a finding in their favor. Therefore, the verdict of the jury in that respect is binding upon this court.

IV. After verdict, application was made by the defendant for a new trial, on the ground of newly discovered evidence, claiming that the written contract of shipment under which the sheep were hauled by The Denver and Rio Grande Railroad Company from Chama, New Mexico, to Denver, did not re-

quire delivery to the defendant, and contained no reference to shipment to any point beyond Denver, except Chicago, nor to any shipment over defendant's line; that the transfer sheet from The Denver and Rio Grande Railroad Company to the defendant shows that said transfer could not have been delivered to the defendant company until after the sheep had been long confined in the pens, and the damage complained of had already been sustained. The motion is supported by affidavits of counsel and others showing that they had no copy of the contract of shipment between The Denver and Rio Grande Railroad Company and plaintiffs, and did not demand one for the reason that they thought it was a part of plaintiffs' case, and that they were surprised in the action of the court in giving Instruction No. 3 to the jury, charging that The Denver and Rio Grande Railroad Company was the agent of plaintiffs; that since the trial counsel had caused search to be made among the files of said company and had found carbon copies of the contract and transfer sheet. The affidavits do not contain a copy of the alleged shipping contract with The Denver and Rio Grande Railroad Company, nor set forth its substance; therefore, neither the trial court nor this court has been informed as to what effect, if any, the written contract, if in evidence, might have. Counsel's affidavit fails to show diligent effort to secure this evidence, which it seems ordinary caution would have required them to investigate prior to or during the trial. The motion was denied, and we see no reason for holding that in such ruling the court abused its discretion.

The record being free from substantial error,
the judgment will be affirmed. *Affirmed.*

Decided April 8, A. D. 1912. Rehearing denied
June 10, A. D. 1912.

[No. 3392, 3393.]

GREAT WESTERN SUGAR CO. AND COLORADO AND SOUTH-
ERN RAILWAY CO. V. PARKER.

1. *APPEALS—Separate—Consolidation of.* The action of the supreme court in consolidating appeals, while pending in that court, will in the court of appeals be regarded as final.

2. *PLEADINGS—Waiver of Objections by Answer.* All objections to the complaint, except that it fails to state sufficient facts, waived by an answer to the merits.

3. — *Construction.* The complaint is to be taken in its entirety and receive a liberal construction.

A complaint against a manufacturing company and a railway company, for negligence in constructing, maintaining and operating trains upon a switch track, within the premises of the manufacturing company, with poles set in such proximity thereto as to endanger the lives of those operating the trains, and charging the death of a brakeman, occasioned by reason thereof, held to state a joint cause of action against the two corporations.

4. — *Allegations Not Proven,* and eliminated by instruction from the consideration of the jury will not be regarded in construing the complaint.

5. *MASTER AND SERVANT—Master's Duty as to the Place of Work.* The master is bound only to ordinary care to make the place where the servant works reasonably safe.

But he is under this duty even where the place of the servant's employment is upon the premises of another.

The master may be presumed to be informed of a condition of his premises involving danger to the servant there employed, where such condition has existed for a time sufficient to enable the master, or his servant charged with his duty in that behalf, to have learned of the danger and corrected the defect, by the exercise of reasonable care.

But the master is not under an absolute duty in this respect.

In an action against a railway company for the death of a servant, attributed to alleged defects in the place of employment,

an instruction that it was the duty of the defendant "to provide for its employes a reasonably safe place to work," was held error.

6. — *Duty to Servants of Another Master.* A manufacturing company which maintains in its premises railway tracks where by its request and invitation a railway company switches cars, bringing freight to, and removing freight from, such premises, is under duty to the servants of the railway company to exercise reasonable care to make such premises reasonably safe for their use.

7. — *Servant's Assumption of Risk.* The servant assumes the risk of injury from defects and dangers in the place of his employment, not only when they are ordinarily incident to the work, but extraordinary defects and dangers, of which he is, by any means informed, or which are so patent and obvious as to be readily observed, and the danger of which he understands and appreciates.

The negligence charged against the master in respect of such defects, the obviousness of the danger, and whether the servant knew of it, are questions for the jury.

8. NEGLIGENCE—*A Question for the Jury.* Only in a very clear case should the court charge that a given state of facts is negligence in law. In an action against a manufacturing company and a railway company, charging joint negligence in erecting and maintaining upon the premises of the former a pole in such proximity to certain railway tracks as to endanger the lives of those operating cars thereon, and the operation and switching of cars thereon by the railway company at the request of the manufacturing company, occasioning the death of a brakeman, it was held that the evidence did not justify a charge that the erection of the pole, or allowing it to remain in such proximity to the track, was negligence *per se*.

The instruction was held especially injurious to the railway company in view of the undisputed fact that it had nothing to do with the erection of the pole, and there was no evidence of any right on its part to remove it.

Reference in the instruction to the fact that the pole was "not a necessary part of or an appliance or convenience or connection in the use of the track," was held to plainly tend to the prejudice of the railway company.

9. INSTRUCTIONS—*Conflicting.* Where instructions conflict it is impossible to know by which the jury were controlled; therefore, instructions which are in direct conflict, one of which is false in law, constitute fatal error, even though the other is without fault.

10. — *Invading the Province of the Jury.* An instruction which assumes to declare as matter of law, what is in fact a question for the jury, is fatal error.

11. *APPEALS—Error Presumed Injurious.* Where the instructions upon the controlling issue are in direct conflict, and the evidence in the record is such that it is impossible to say that the jury were not misled, prejudice will be presumed.

Appeal from Larimer District Court. HON. HARRY P. GAMBLE, Judge.

MESSRS. DINES, WHITTED & DINES, Mr. C. W. WATERMAN, Mr. CALDWELL MARTIN, for appellants.

MESSRS. FLEMING & AULT, for appellee.

WALLING, Judge.

Appellants were the defendants in an action brought by the appellee, as plaintiff, to recover damages for the death of appellee's husband, Dillard B. Parker, alleged to have occurred in consequence of the negligence of the appellants.

The complaint, after stating the relationship of the plaintiff to the deceased, and the incorporation and business of the defendants, alleged in substance: That on November 24th, 1906, the defendant sugar company owned and operated a plant and appurtenances for the manufacture of sugar. That a certain spur or side track connected the main line of the appellant railway company with the plant of the sugar company, which side or spur track was on the property of the sugar company, and was used by it for the purpose of receiving shipments of freight from, and delivering freight for shipment to the railway company; and for those purposes the sugar company directed and requested the railway company to come on and along the side or spur track, by its servants and employees, and with

its engines and cars, and pursuant to such direction and request the railway company did frequently enter on the side or spur track by its servants, agents and employees, and with its engines and cars. That the railway company, as a part of its business, for the purposes of delivering to and receiving from the sugar company shipments of freight for transportation over the former's railway, and providing and placing cars for such purposes, made use of the side or spur track as aforesaid. That along such side or spur track, the defendants erected, or permitted to be erected and maintained, a certain pole or series of poles, with iron spikes or bars projecting therefrom towards said track, which pole or poles were negligently erected, or permitted to be erected so close to said track, as to endanger the lives and persons of those operating the trains thereon, and were negligently and carelessly allowed and permitted so to remain by the defendants; and that said poles were negligently erected or permitted to be erected by the defendants, and by them negligently allowed to remain, at a point along said track where an embankment about three feet high sloped directly down to the edge of the track, and so as to endanger the lives of those operating trains over the track. That plaintiff's husband, Dillard B. Parker, on and prior to the date mentioned, was employed by the railway company as brakeman, and, on that date, by direction of the railway company, went upon the side or spur track, on a train of the railway company, engaged in performing his duties as brakeman. That in the performance of his duties, he was riding on the side of one of the cars, when he was struck by one of said poles, or a spike projecting there-

from, and thereby thrown under the train of cars and killed. There was the further allegation that the train, on which the brakeman was riding, was operated at a high and negligent rate of speed by the railway company's employees. Damage to the plaintiff was alleged, and the complaint concluded with the usual prayer for judgment.

The answer of the sugar company admitted that since February 28th, 1905, it had operated the plant and appurtenances for the manufacture of sugar, but denied that the business or plant was owned by it, or that it was interested in the same at any time prior to that date. It admitted that on November 24th, 1906, and prior to the twenty-eighth day of February, 1905, there was a spur or side track connecting with the main line of the railway company's railway, running to the sugar company's property and up to its plant and sugar factory, and that connected with the spur or side track were various other side tracks situated upon defendant's property; and that the defendant railway company used such tracks for the purpose of delivering shipments of freight to and receiving shipments of freight from the sugar company; and denied each and every other allegation of the complaint.

In the second defense of the same answer, it was alleged that said Dillard B. Parker was well aware of all the various structures mentioned in the complaint, and the location thereof in relation to the railroad tracks, and was well aware of all the dangers incident to his employment, at all times and places mentioned in the complaint, and assumed the risks of his employment with respect to such structures and tracks.

A third defense alleged contributory negligence on the part of the deceased.

The answer of the railway company admitted that it was the owner of and operating the railway mentioned in the complaint; and admitted the allegations with respect to the spur or side track connecting its line of railway with the premises and factory of the sugar company, for the purposes alleged in the complaint. It further admitted that Parker was employed by the railway company as a brakeman, and that he came to his death on the date alleged. The answer denied the other allegations of the complaint. In a separate defense, the answer alleged that deceased was warned of the existence of various structures, including poles, at different places such as might endanger life and limb, and as a condition precedent to his employment he agreed to familiarize himself with the location of such dangerous structures and obstacles; and that, if the accident was caused as alleged in the complaint, it resulted from conditions with which the deceased was required by his contract with the railway company to familiarize himself, and that he had had sufficient time and opportunity to do so. Other defenses pleaded assumption of risk by the deceased, and his contributory negligence.

Prior to answering the complaint, the appellant sugar company filed a motion, and afterwards a demurrer to the complaint, which were overruled in turn. The plaintiff replied to the answers of the defendants, denying the new matters alleged therein. Before entering on the trial, the sugar company interposed a motion to require the plaintiff to elect as between two supposed causes of action contained

in the complaint, which motion was overruled. The objection of both defendants to the admission of evidence under the complaint, for want of sufficient allegations to constitute a cause of action, was likewise overruled.

The following facts appeared from the evidence. The deceased, Dillard B. Parker, was employed by the railway company as a brakeman, on October 8th, 1906, and worked continuously in that employment until his death. During the two weeks immediately prior to his death, except four days when he was ill, Parker worked on the night switching crew then engaged in switching cars at the yard of the defendant sugar company, wherein its factory was situated. It was at the time of the greatest activity in the operations of the sugar factory, and the volume of freight handled for the sugar company was of such magnitude as to require the employment by the railway company of two switching crews for that purpose, one working in the day time and the other at night. The switching of cars to and from the factory was accomplished by means of the spur track, entering the sugar company's premises through a gate on the westerly side thereof. Other tracks in the sugar company's yard connected with the main spur, for the convenient placing of cars for loading and unloading freight. The main spur track, after it entered the factory yard, was known as the run-around track. It was originally laid at or about the time of the construction of the factory, and prior to the time when the sugar company acquired title to and ownership of the premises, which was in February, 1905. Prior to the acquisition of the sugar factory and premises by the appellant su-

gar company, its predecessor in ownership had constructed a system of flumes in the factory yard, for the purpose of conveying beets from the beet piles to the factory, and had established electric light poles, set in a line from northwest to southeast, parallel to and about thirty inches distant from the most northerly beet flume. These poles were so erected for the purpose of lighting the flumes, but it does not appear from the evidence that they were used for that purpose, or for any purpose, at the time to which this discussion relates. The track known as the run-around track was located north of this line of poles. At the time of the accident here involved, the distance between the most westerly pole and the center of the run-around track was ten feet and one inch, and between the most easterly pole and the center of that track was seven and one-tenth feet. The space between the most easterly pole and the south rail of the run-around track was four feet, six and a half inches.

The easterly pole mentioned was a timber six inches by six inches in dimensions, twenty feet in height above the ground, painted white; and there were climbing-spikes driven alternately in the south and north sides, the spike on the north side, toward the track, being about six feet above the ground, and projecting six inches towards the track. It appears that the distance between the center of the track and the most easterly pole was at one time about twelve feet; but just when the location of the track had been changed at that place does not appear. So far as the proof shows, it may have been moved before the appellant sugar company acquired the property. The ties and rails compos-

ing the tracks in the sugar company's yard were the property of the railway company, which laid the tracks and exercised control over them. As has been said, the two switching crews were kept by the railway company for the purposes of the sugar company's freight business, and were subject to the call of the agents of the sugar company for that purpose; and those crews were under the direction of the agents of the sugar company, with respect to the placing of cars on the different side tracks in the yard, for the purposes of loading and unloading, and the switching of cars to and from the yard. The sugar company had no authority or control over any of the railway company's employees except as stated, and had no power to discharge or supplant any of them. Whatever work was done on the spur and side tracks in the yard was done by the railway company, and not by the sugar company. There was some testimony that the sugar company paid the expense of repairing those tracks, or some part of it, and there was also direct and positive proof to the contrary.

On the night of November 23rd, 1906, the crew in which the brakeman Parker was working, consisting of engineer, fireman, conductor and two brakemen, went into the factory yard with a train of cars loaded with lime rock, which were placed on a track called the lime-rock track, connected by a switch with the run-around track. Thereafter the engine was coupled to four empty coal cars on the run-around track, and the train, consisting of the engine and the four coal cars, proceeded west on the run-around track out of the yard. Parker assisted in placing the cars on the lime-rock track, and

after that work was finished he was seen to walk away. This was about ten minutes before the engine and coal cars started out of the yard. When the train started west on the run-around track, the other brakeman of the switching crew, Tindall, stood at the rear end of the car next to the engine. The train was started upon a signal given by one McCorkle, a contractor with the sugar company, the signal being repeated to the engineer by the brakeman Tindall. The conductor and the two brakemen, as well as McCorkle, had lanterns, as the night was somewhat dark. The yard was not wholly dark, as there was an electric light on a pole near the lime-rock track, about one hundred and fifty feet distant from the easterly electric light pole above described, and there was a dim reflection from the lights in the factory, besides the head-light of the engine. When the train, consisting of the engine and four empty coal cars, started out of the yard, the rear of the last car was some five car-lengths easterly from the most easterly electric light pole above described. The conductor stepped upon the brake beam of the rear car; and just before doing so he saw two lanterns ahead of him, one near the engine and the other about midway between him and the engine, on the south side of the train. He could distinguish the form of a man holding the lantern nearest him, but could not tell who he was. After the train started, the conductor, from the position occupied by him, was unable to see the south side of the cars. The brakeman Tindall saw a lantern on the south side of the train, when it started, and after it had gone about a car length and a half, the lantern disappeared. No one saw Parker get on the train going

out of the yard, and no one had recognized him for about ten minutes prior to the starting of the train; and he was not seen thereafter, until, after the train had passed out of the factory yard, the rear car of the train was derailed, and the unfortunate man's body rolled out from under the car. This occurred at a point six or seven hundred feet from the pole, which had been called the most easterly electric light pole. The ground was covered with snow, and an impression in the snow was traced from a point just inside the factory gate for over five hundred feet to a point about three feet west of the easterly electric light pole mentioned. This impression was along the south rail, and on both sides of it, as if a body had been dragged along, and it terminated about three feet west of the easterly electric light pole, in an impression extending from two feet south to eighteen inches north of the south rail, appearing as if made by a man's body falling, or sliding or slipping down into the snow. The impression in the snow did not extend east of the pole. None of the witnesses heard any outcry; and no one realized that anything unusual had happened, until the conductor discovered the body, outside of the yard. An examination of the body, the next morning, disclosed that there was a mark on his right cheek, about the size of the print of a man's thumb, his right arm was broken in two places, and there was a gash or hole across the small of his back.

At the front end of each of the coal cars, on the south side, there was a grab-iron, at the height of about five feet above the rail, and attached to the bottom of the car, directly underneath the grab-iron, there was a stirrup or footrest. There was

no evidence as to the height of the stirrup above the track, or as to Parker's height, if he was riding, as assumed, on the side of one of the coal cars, with his foot in the stirrup—as to which, of course, there was no direct evidence. There was testimony to the effect that the side of the coal car would overhang the rail by about two feet, two and a half inches. The surface of the ground at the easterly electric light pole was eighteen to twenty inches higher than the rail. Parker's lantern was found about three feet west of that pole, and about five or six feet south of the south rail of the run-around track. It appeared from the testimony that, during the period of his employment with the switching crew, Parker had worked in all parts of the yard, from early in the evening until early in the morning; that this particular track, which ran past the electric light poles, was frequently used for the switching of cars, and entering and leaving the yard; that the coke bins adjacent to the track, as well as the switch connecting it with the lime-rock track, were some distance east of the most easterly of the row of electric light poles; and that, on the night of the accident, that pole, towering in the air, was easily seen at a distance of ten feet. It was shown that there were a number of structures and obstacles in different parts of the yard, including standpipe, coke bins, fencing of incline into coal chute, lime-rock piles, shed, etc., so close to the side tracks, as not to leave room for a man's body between the structure or obstruction and a passing car; and that the deceased brakeman was several times warned by other members of the switching crew, during the time he worked in the yard, that the yard was a danger-

ous place to work in, and he was admonished at different times to observe care and caution, as he appeared to be somewhat venturesome and heedless of danger. On two occasions he was warned by those working with him in the yard, that if he did not use more caution about his work, he would be killed. The engineer who worked with Parker on the switching crew during the week preceding the accident, testified:

"I told Parker that he was trying to work entirely too fast around the yards; that it was a very dangerous place, and that at the gait he was going, he would sooner or later get killed or hurt. I also told him he would have to use more judgment in getting on and off the engine, and that he was taking too many chances. I also warned the man about how close different things came to the track, especially down around the lower part of the yards back of the factory. He said that he was doing the best he could, but that he had just started in railroading. I told him he would better lay off from that position and get a daylight job around the place, if he was to work around there, so as to familiarize himself with the dangers of the place."

At the conclusion of the trial, the jury, having received the instructions of the court and retired to deliberate over their verdict, returned into court separate verdicts against the defendants respectively, the verdict against the railway company being exactly twice as much as that against its co-defendant. The verdicts were not received; but, after the court had stated to the jury that such separate verdicts were not permissible, and had given them some further advice as to their duties, the jury were again

permitted to retire. Thereafter a verdict was returned against both defendants jointly for a single sum. After the motion for a new trial, filed by each defendant, had been overruled, a joint judgment was entered against them for the amount of the verdict.

Separate appeals were prayed by and allowed to the defendants severally, and thereafter perfected. After the appeals were docketed in the supreme court, they were ordered to be consolidated, and motions made by appellee to dismiss them were denied by the court. This action of the supreme court must be regarded as the final adjudication of the objections urged by counsel for the appellee, in their brief and oral argument, touching the regularity of the appellate proceedings and the jurisdiction of the court to review the judgment.

With respect to the errors assigned by the sugar company upon exceptions to rulings affecting the pleadings, all objections of the appellant in that particular were waived by the filing of the answer, except the objection that the complaint did not state facts sufficient to constitute a cause of action. That the allegations of the complaint, if sustained by evidence, sufficiently stated a cause of action against both defendants, we do not think admits of serious question. What will be said hereafter with respect to the law governing the case will cover the objections to the sufficiency of the complaint. The ruling on the motion to require an election by the plaintiff calls for no extended discussion. The motion was based upon the theory that the complaint undertook to state two causes of action in one—to-wit, a cause of action against both defendants jointly, and one against the railway company alone. The

criticism involved in the motion was highly technical, and is met by these considerations: (1) It was the duty of the court to liberally construe the complaint as an entirety, and so construed, it was properly held to state a single cause of action against both defendants. If in fact the negligence of both defendants combined to cause the injury as alleged, the action was properly brought against them jointly, although the same legal theories did not apply in determining the negligence of each. (2) By going to trial against both defendants, the plaintiff elected to proceed against them upon a joint cause of action. (3) The supposed duplication of causes of action arose from the allegation at the end of paragraph eight of the complaint, which charged that the train was being driven at an excessive and negligent rate of speed. No evidence was introduced in support of such allegation, and it was expressly eliminated from the case by an instruction given by the court.

In submitting the cause to the jury, the court instructed them as to the law of the case, in thirty-seven separately numbered instructions—or rather thirty-six, since instruction numbered thirty-seven was the usual admonition, that the instructions should be considered as a whole. Errors in those instructions are alleged in several assignments of the appellants, and it is believed that the correct decision of the case hangs upon the validity of the instructions challenged. By instruction numbered four, the jury were charged “that it is the duty of the Colorado and Southern Railway Company to provide for its employes a reasonably safe place to work. Actual ownership of the place wherein it

sets its employes to work is immaterial, so that such place is used by it in its business, and that this duty is to be performed in view of the nature and character of the work to be done." Error is assigned upon an exception to this instruction by the appellant railway company. The evident conclusion from the instruction was that, if the railway company had failed in the performance of its duty as therein defined, it was actionable negligence on its part.

The law of this state is in no uncertain condition, upon the decisions of our appellate courts, respecting the measure of the duty of the employer as to places and appliances, where and by means of which an employee is to perform the work incident to the particular employment. A brief *resume* of some of the numerous decisions of our courts bearing upon this subject will be sufficient for the purposes of the present discussion. Upon a full consideration of the authorities, it was ruled in *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499 (*l. c.*, p. 502): "The master impliedly (if not expressly) contracts to use ordinary care and diligence * * * in the selection of * * * safe * * * machinery and appliances, and is liable for his own negligence in these respects."

In the same case it was further said (at page 510): "The company must use all reasonable precautions and care to secure the safety of its employees by keeping the roadway in repair. It cannot through want of watchfulness expose them to unreasonable risks in this respect, and escape liability, but the duty imposed is that of ordinary care. This ordinary care must be measured by the danger

of the service, proportioned to it. Considering the dangerous force which a railway company puts in motion, the term 'ordinary care toward its employees' imposes, without doubt, a high degree of diligence in keeping the road and all its appliances in proper repair, but it neither warrants nor insures against defects."

Mr. Justice Helm, speaking for the court in *Wells v. Coe*, 9 Colo., 159, said:

"*First.* In the purchase of safe machinery and appliances for use in his business, the master is required to exercise ordinary care and diligence; such care and diligence having reference to the hazards of the employment, and being proportioned to the dangers of the service. If, through the want of ordinary care in this respect, unsafe or defective machinery is procured, and the servant, without fault on his part, is thereby injured, the master is liable. *Colorado Cent. R. R. v. Ogden*, 3 Colo., 499; *Beach, Neg.*, sec. 123.

Second. The master is likewise charged with the further duty of maintaining in suitable condition the machinery and appliances used in his business. In this regard he is also required to exercise ordinary care and diligence, and is liable for injuries, resulting from his ordinary negligence, to the servant, without fault on the latter's part; the question as to what shall constitute such ordinary care having reference likewise to the danger which the service naturally imposes upon the employee. *Hough v. Railway Co.*, 100 U. S., 213; *Beach, Neg.*, sec. 124."

In a subsequent case, it was said:

"Tenney was engaged in a dangerous occupa-

tion; he was working for the interest and profit of his employers; it was their duty, therefore, to exercise reasonable care and diligence in providing for his safety while thus employed. This duty included the exercise of reasonable care in procuring and keeping in repair the machinery and appliances by which their employees were to be carried to and from their work in the bowels of the earth. See *Wells v. Coe*, 9 Colo., 161, and cases there cited; also 2 Thompson on Negligence, 972." *Moffatt v. Tenney*, 17 Colo., 189.

In *Carleton M. & M. Co. v. Ryan*, 29 Colo., 401, the court said:

"As applied to the conditions proper to consider in this case the law is, that an employer is required to exercise ordinary care in providing a reasonably safe place for his employees to work in."

"It is the duty of the master to exercise ordinary care in seeing that his servants are provided with a reasonably safe place in which to work, and that the instrumentalities and appliances to be used by them are in a reasonably safe and suitable condition." *Roche v. D. & R. G. R. R. Co.*, 19 Colo. App., 204. (Thompson, Judge.)

The following language was used in *Williams v. Sleepy Hollow M. Co.*, 37 Colo., 62:

"The employer must exercise ordinary care to provide a reasonably safe place in which the employee may perform the services required of him. It is his duty to use diligence to keep his place in reasonably safe condition so that the servant may not be exposed to unnecessary risks. The care and diligence required differ as circumstances differ, but in all cases it is such as a reasonably prudent man

would exercise under like circumstances in order to protect the persons of his employees from destruction or injury." See also *D. & R. G. R. R. Co. v. Warring*, 37 Colo., 122; *Kent Mfg. Co. v. Zimmerman*, 48 Colo., 388, 398; *Portland G. M. Co. v. O'Hara*, 45 Colo., 416; *Rice v. Van Why*, 49 Colo., 7; *C. F. & I. Co. v. Gardner*, 121 Pac., 680.

In other jurisdictions, instructions substantially similar to the instruction numbered four quoted above have been held to be erroneous, and sometimes fatal to the verdict. *Anderson v. Nor. Pac. Ry. Co.*, 34 Mont., 181; *Hughley v. Wabasha*, 69 Minn., 245; *C. B. & Q. R. Co. v. Oyster*, 58 Nebr., 1; *Choctaw etc. R. Co. v. Holloway*, 114 Fed., 458.

In *Portland G. M. Co. v. O'Hara*, *supra*, an instruction, commencing with the statement that "it was the duty of the defendant to furnish a reasonably safe place in which the plaintiff was required to work," contained the further direction that, if the jury found from the evidence "that the uncovered condition of the shaft and set screws was dangerous to those working in the screen room in discharging their duties, and that it could have been covered so as to render it safe to those working in said screen room, then it was negligence on the part of the defendant to leave such shaft and screws uncovered;" and it was ruled that the instruction, as a whole, was error for reversal, under the prior decisions of our courts, which were cited in the opinion.

In the present case the court further charged the jury, in instruction numbered six, as follows:

"The jury are instructed that the erection of a pole, or allowing a pole to remain, after the presence

thereof should have been known, by the exercise of reasonable care, which pole is not a necessary part of or appliance or convenience or connection in the use of the track, in such close proximity, and at such a place along said track as to be dangerous to the employes of the defendant, The Colorado and Southern Railway Company, is negligence *per se*."

It seems that it must be a very clear case that would justify an instruction to the jury that a certain state of facts constituted negligence *per se*—that is, negligence in law, where the facts are to be tested by the variable standard of ordinary care, depending upon oral testimony and the inferences to be drawn therefrom.

"The existence of negligence should be passed upon by the jury as any other fact, and it is improper to instruct that a certain fact or group of facts amounts to negligence *per se*, unless such acts are declared by law to be negligence *per se*, or are such as to induce an inference of negligence in all reasonable minds." 29 Cyc. L. & P., 645.

In *D. & R. G. Co. v. Burchard*, 35 Colo., 539, the court, denying the petition for rehearing, used this language (at page 562):

"We cannot declare as a matter of law that the location of the crane so as to bring the end of the arm within ten inches of the cab was negligent *per se*. * * * If it was unreasonably and unnecessarily near for the efficient operation of the appliance, there was negligence, otherwise not. As stated in the main opinion, the mere fact that it was dangerously near did not constitute *per se* negligence."

And in *Williams v. Sleepy Hollow M. Co.*, *supra*, the court said:

"The ordinary care which the parties are to use in the discharge of their respective duties so varies with the situation of the parties, their knowledge or means of knowledge, the surrounding circumstances of each particular case, the measurement of which depends so much upon the knowledge and experience of practical men in practical affairs, that it has long been the policy of the law to submit the question of reasonable care to the judgment of a jury."

In this case, the exercise of ordinary or reasonable care by the railway company was not submitted to the jury. The instructions four and six, considered together, were far more prejudicial, from the standpoint of the railway company, than that condemned in *Portland G. M. Co. v. O'Hara*. The evidence was undisputed that the railway company did not erect the pole referred to, nor was there any proof that the company had any right to remove it or require its removal. It was evident that the pole, to use the language of the instruction, "*was not a necessary part of or appliance or convenience or connection in the use of the track.*" The poles were erected by the sugar company, for the purpose of lighting its beet flumes. Whether they were used for that purpose, in connection with the operations of the factory, at the time of the occurrence of the accident, or not, they were a part of the structures composing its plant, erected upon its own premises, not occupied by the railway company, and in no wise within the control or authority of the latter company, so far as this record shows.

The reference in the instruction to the obvious fact that the pole was not an appliance or convenience used in connection with the operation of the tracks, as constituting an element of negligence on the part of the railway company, plainly tended to the prejudice of the latter company. The effect of instruction numbered six was to advise the jury that, if the situation of the pole was such as to be dangerous to the railway company's employees, that was, of itself, a conviction of negligence; and this was error. See *Electric Ry. Co. v. Moore*, 113 Tenn., 531; *Moore v. Chattanooga etc. Co.*, 109 S. W., 497; *Dalton v. Receivers*, Federal Cases, No. 3550.

The facts of this case are easily distinguished from those, wherein obstructions were placed on or over premises owned, or occupied and controlled by a railway company, whether so placed by the company itself, or by another with or without its permission, in such a way as to endanger the company's employees in the operation of its road. In all such cases the railway company, if not originally responsible for the obstruction, had the power to compel its removal. See *Erslew v. Railroad Co.*, 49 La. Ann., 86; *Illinois Terminal R. R. Co. v. Thompson*, 210 Ill., 226.

We must not be understood as holding that the fact that the tracks of the railway company were laid in the premises of the sugar company, for the mutual business advantage of both companies, relieved the railway company from the exercise of the proper degree of care, in view of the conditions, and the nature and exigencies of the work to be done, to provide a reasonably safe place for the performance of the work by its employees. The ob-

jection to the instructions given, as bearing upon the question of the railway company's negligence, is that its duty was nowhere correctly stated, while the effect of the instructions under consideration was to make it an insurer of the safety of its employees engaged in that particular work. *Portland G. M. Co. v. O'Hara, supra.*

By instruction numbered ten, the jury were charged that if they found from the evidence that the defendant railway company "moved its tracks so close to said pole as to render its proximity there-to dangerous," then the said defendant was "responsible therefor." This instruction would not have been objectionable in the abstract, if the jury had been properly instructed as to the nature and extent of the responsibility of the railway company. It certainly did not tend to correct the errors in the instructions numbered four and six.

Error is assigned by both of the appellants upon their exceptions to instructions numbered fifteen and sixteen given by the court in charging the jury. Those instructions were as follows:

(No. 15.) "The jury are instructed that said Dillard B. Parker assumed only such risks as were ordinarily and reasonably incident to his employment, and as came within his knowledge, or should, because of their obviousness, have become known to him after he entered into the employment of defendant, The Colorado and Southern Railway Company, where he remained in employment after knowledge or after he should have had knowledge thereof, as stated."

(No. 16.) "The jury are instructed that said Dillard B. Parker, in entering into the employment

of the defendant, The Colorado and Southern Railway Company, assumed only the risks ordinarily and reasonably incident to the nature and character of the work he was to do."

Instruction numbered thirty-two, given at the request of counsel for the railway company, was as follows:

"You are instructed that in entering upon his employment as a brakeman, the deceased assumed the risk of all dangers ordinarily incident to his work, and if he was assigned to work at an unusually or extraordinarily dangerous place, and was informed of said unusual or extraordinary dangers, or by any means learned thereof, and understood and appreciated them, said dangers became ordinary to said employment, and were likewise assumed by him, and if his death was the result of said dangers, the risk of which was assumed as hereinbefore defined, the plaintiff cannot, in any event, recover in this action."

It is evident from reading these three instructions that all of them cannot embody a correct statement of the law of assumption of risk. By instruction fifteen, the jury were told that the deceased assumed *only* the risks *ordinarily and reasonably* incident to his employment, *and* which came within his knowledge, or should, by reason of their obviousness, have become known; and by instruction numbered sixteen, that he assumed *only* the risks *ordinarily and reasonably* incident to the nature and character of the work he was to do. By instruction numbered thirty-two, the jury were informed that the deceased assumed not only the risk of all dangers ordinarily incident to his work, but also unus-

ual or extraordinary dangers, if he was informed, or by any means learned of such unusual and extraordinary dangers, and understood and appreciated them. We are confronted, then, with a situation somewhat similar to that presented in the case of *C. & S. Ry. Co. v. McGeorge*, 46 Colo. 15, wherein the court said, in discussing certain instructions concerning the duties and liabilities of a common carrier:

“No argument is needed to show that they (the instructions) are in hopeless and irreconcilable conflict. * * * Both cannot be right. If the first is, then there was no prejudicial error in giving the latter, as it states a rule more favorable to the defendant than it was entitled to have. * * * On the other hand, if the first of said instructions incorrectly states the law, then the case must be reversed, because of the conflict between it and the true rule; for it is impossible to determine upon the doctrine of which instruction the jury acted, or by which it was governed, in reaching its verdict.”

We need not go beyond the decisions of our own courts, to ascertain the law of assumed risk, applicable to the circumstances of the present case, and it would be manifestly improper to do so, for the purpose of searching for declarations of principles inconsistent with what appears to be the established doctrine of our supreme court. To attempt to review all of the decisions of our appellate courts upon the subject would extend this discussion to an unwarranted length; and attention will be called to only a few controlling expressions found in some of them.

In *Wells v. Coe*, *supra*, it was said:

"Where injury is suffered by an employee, through defects in the machinery and appliances furnished by his employer and used in the business, if the employee knew, or had means of knowledge equal to that of his employer, concerning such defects, yet continued in the latter's service, he cannot recover; provided no inducement, such as a promise to remove the defect, and thus remove the danger, led him to remain."

In *Harvey v. Mountain Pride G. M. Co.*, 18 Colo. App. 234, the following language is quoted from the opinion of the supreme court in *Denver Tramway Co. v. Nisbet*, 22 Colo. 408:

"Under these circumstances he (plaintiff) was precluded from recovering by the well-settled rule that an employee assumes *all the risks naturally and reasonably* incident to the service in which he engages, *and those* arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge equal to his employer's, or any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby."

And in the recent case of *Kent Mfg. Co. v. Zimmerman*, 48 Colo. 388, 400, the rule sustained by our decisions was thus stated:

"As applied to this case, it may be said that an

employee accepts service subject to all of the risks naturally and reasonably incident to the employment in which he engages, and those arising from defects or imperfections in the machinery which he is employed to operate, that are open and obvious, or which he could have ascertained by the exercise of ordinary diligence.—*Denver Tramway Co. v. Nisbet*, 22 Colo. 408—and so it follows that where an employee suffers an injury through defects in machinery about which he is engaged, of which he knew, or should have known, or had means of knowledge equal to that of his employer, he cannot recover.—*Wells v. Coe*, 9 Colo. 159. In other words, *the employee assumes all the risks and perils usually incident to the service in which he engages, and included in such risks and perils are those which it is a part of his duty to ascertain by observation.*”

Instruction numbered thirty-two appears to be clearly within the principle announced by the cases cited. On the other hand, the abstract principle stated in instruction numbered fifteen, as given, appears to be wholly without any support.

Instruction numbered sixteen was erroneous, in that, by the use of the word *only*, the application of the rule of assumption of risk was restricted to the very words of the instruction. It is a general rule that the employee does not assume risks caused or increased by the employer's negligence. And it has been said that the employee has the right to assume that the employer has not failed in his duty to use ordinary care to provide reasonably safe places and appliances for the performance of the work required of the employee. The principle, with its proper qualification, was stated in the opinion of the Su-

preme Court of the United States in *Choctaw etc. Ry. Co. v. McDade*, 191 U. S. 64, 68, from which the following quotation is taken:

“This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continue in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover.”

In this instance, the alleged negligence of the defendants, as well as the obviousness of the alleged dangerous condition and presumption of knowledge on the part of the railway company's employee, were questions for the determination of the jury, under proper instructions. *D. & R. G. R. R. Co. v. Burchard*, *supra*; *Williams v. Sleepy Hollow M. Co.*, *supra*; *Kent Mfg. Co. v. Zimmerman*, *supra*.

The conclusion is that the court erred in giving the instructions numbered fifteen and sixteen, and that such error was not cured by the conflicting and contradictory instruction, although the latter was correct in principle. *Colo. & Sou. Ry. Co. v. McGeorge*, *supra*; *Walsh v. Henry*, 38 Colo. 393, 398; *San Miguel etc. Co. v. Stubbs*, 39 Colo. 359, 366; *Anderson v. Nor. Pac. Ry. Co.*, *supra*; *Stratton v. Ellison*, 42 Colo. 498, 516; *City of Boulder v. Niles*, 9 Colo. 415, 421.

The instructions which have been considered

related to the most important issues in the case, and the state of the proof was such as required the careful instruction of the jury, to enable them to arrive at a proper conclusion. In the condition of the evidence presented by this record, it does not seem possible to say that the jury were not misled by the erroneous instructions above indicated; and resulting prejudice must be presumed. *Denver etc. Co. v. Cowan*, 116 Pac. 136.

A few words may be added respecting certain objections particularly urged by the appellant sugar company. The court instructed the jury that that company "is presumed to have known of the proximity of the electric light pole to the track of the railway company at the time in question, regardless of whether it had actual knowledge thereof or not, provided the conditions then existing had been in existence for a sufficient length of time for the sugar company, or its agents, in the exercise of reasonable care on its part, to have learned thereof." It is difficult to see how the sugar company can reasonably complain of this instruction. So far as the evidence shows, the run-around track was in the same location at all times after the sugar company acquired the ownership of the premises. The testimony of some of its agents to the effect that they were not aware of the distance between the track and the easterly pole until certain measurements were made after November 24th, 1906, can hardly be regarded as overbalancing the presumption that the company was or might have been acquainted with the conditions existing upon its own premises, and which could have been ascertained by reasonable inspection. It will be borne in mind that the

railway company was not a mere license, which had laid the tracks for its convenience alone in the sugar company's yard; but the tracks were there pursuant to an existing business arrangement between the two companies, and the maintenance of the tracks, and the switching operations carried on by means thereof, were an important and necessary adjunct to the operations and business of the sugar company, as then conducted and carried on. The only portion of the opinion in *Watson v. M. & P. P. Ry. Co.*, 41 Colo. 138, which is germane to the situation here, is the quotation therein from *Bennett v. Railroad Co.*, 102 U. S. 577, wherein it was said:

"It cannot be pretended that Bennett, at the time he was injured, was, in any sense, a trespasser upon the premises of the company. Nor is this case, like many cited in the books, one of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended, or an inducement, or, in the language of some of the cases, an allure-ment, held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make it a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.' "

It was not error to charge, as was done by the

instruction numbered twenty-eight, "that if the switching crew of which Dillard B. Parker was a member went into the yard of the defendant, The Great Western Sugar Company, at the invitation, express or implied, of said defendant, for the purpose of moving cars for the use, benefit, or convenience of said defendant, or for the mutual use, benefit, or convenience of both defendants, The Great Western Sugar Company was required to use reasonable care to see that the premises were reasonably safe to be used by said switching crew, including said Dillard B. Parker, for the purposes for which they entered said premises pursuant to said invitation,"—particularly in consideration of other instructions given, which were favorable to the sugar company, singling it out by name. See *Anderson v. Nor. Pac. Ry. Co.*, *supra*; *John Spry Lumber Co. v. Duggan*, 182 Ill. 218; *Indiana B. & W. Ry. Co. v. Barnhart*, 115 Ind. 399, 408; *Foster v. Portland Gold Mining Co.*, 114 Fed. 613-614; 1 Thompson Com. on Law of Neg., §§ 978-979; 29 Cyc. L. & P. 451.

Comparison of instruction twenty-eight with numbers four and six indicates that the learned judge of the trial court intentionally distinguished as between the defendant companies, with respect to the standard of care, which measured the duty of each to the members of the switching crew working in the sugar company's yard. This was an erroneous view. The duty in either case was that of exercising ordinary care, in view of the nature of the work,—by the sugar company, to see that its premises were in reasonably safe condition for the necessary operations of the railway company therein, and by the latter company, to provide a reason-

ably safe place and reasonably safe appliances for the performance of the work by its employees.

Other assignments of alleged errors need not be considered, as the matters complained of may not occur on a retrial. By reason of the errors in instructing the jury, as herein indicated, the judgment is reversed, and the cause will be remanded for a new trial.

Reversed.

[No. 3402.]

BROOKS v. BLACK.

1. **PLEADINGS—Reply.** Plaintiff, claiming an equitable title to certain lands, under a bond for a deed from one having the legal estate, brought suit to quiet her title as against the holders of sheriff's deed, upon sale under execution against a stranger, as a cloud upon her title. The answer alleged that the only interest of plaintiff was derived by conveyance from the execution defendant, her husband, made without consideration, and in fraud of his creditors. Held, plaintiff was entitled to reply that she was a householder and the head of a family occupying and claiming the premises as her homestead, and had made the statutory claim thereto, as a homestead, prior to the recovery of plaintiff's judgment.

2. **HOMESTEAD—Occupied Under Executory Contract of Purchase.** Lands held under a mere executory contract of purchase may be claimed as a homestead. Such agreement when recorded is "record title" within the meaning of the statute.

3. — **Construction of the Statute.** The statute extending to the debtor the right to exempt his homestead from execution is to be liberally construed. Any interest in lands coupled with possession, by a qualified person, is sufficient to support the homestead right.

4. — **Lands Acquired Under Fraudulent Conveyance.** Husband conveys land to his wife with intent to defraud his creditors. The wife conveys to a third person, who takes for value and without notice of the fraudulent character of the husband's conveyance. He executes to the wife a bond conditioned to reconvey. The wife occupying the premises with her husband may lawfully claim them as a homestead.

5. CONTRACT—*Who May Assail*. In the same case, held that the judgment creditor of the husband, not being a party to the transaction between the wife and the one to whom she conveyed, nor privy to it, nor a creditor of either of the parties thereto, should not be heard to raise question as to the effect of the bond to reconvey, as to whether it was, in law, an agreement to sell, or a mere mortgage defeasance.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

MR. FRANK J. ANNIS, MR. FRED W. STOW, MR. FRANK L. MOORHEAD, for appellant.

MESSRS. CLAMMER & SARCHET, for appellee.

KING, J. delivered the opinion of the court.

The only questions raised by the assignments of errors and relied on in the briefs of counsel for appellant, are, (1) that the plea of the homestead exemption in plaintiff's reply constituted a departure from the cause of action set forth in the complaint, and on motion of the defendant should have been stricken, and the evidence offered in support thereof excluded; (2) that the homestead entry of plaintiff was not made upon her "record title", that is, was not made in the margin of the proper instrument. No other questions require consideration.

Plaintiff (appellee) alleged that she was owner of an equitable estate in, and in possession of, certain real estate, under a bond for a deed from the holder of the legal title to said premises; that defendant had caused a levy to be made upon, and sale of, said real estate under an execution against a judgment debtor, not the plaintiff, nor the obligor or grantor in the said bond; that said levy and sale constituted a cloud on her title, and prayed that the

same be declared void, and her title quieted. Defendant's answer and cross complaint denied plaintiff's alleged interest in the realty, and alleged that any interest plaintiff appeared to have was derived through a deed from her husband, the judgment debtor, made without consideration, and for the purpose of defrauding his creditors, and therefore void; that judgment had been obtained against said husband by the defendant, and the levy and sale complained of were made under the execution against said husband, and that said real estate was, of right, and in law, the property of the husband, and prayed that the levy and sale be confirmed and defendant's title to said premises quieted. Plaintiff, by her replication, alleged that at all times mentioned she had been and still was a householder, the head of a family, residing upon and occupying said premises as a homestead, with her said husband and family; that the value of the property was not to exceed two thousand dollars; that prior to said judgment and levy, to wit, on September 5th, 1907, she had claimed said premises as a homestead by appropriate entry in the margin of her record title, to wit, in the margin of the record of said bond for a deed.

1. Motion was made by defendant to strike this reply for the reason that it constituted a departure from the cause of action in the complaint, and objections were made to evidence offered in support thereof for the same reason. Both motion and objections were overruled. Plaintiff had the right to plead her homestead exemption in avoidance of defendant's cross complaint and prayer for affirmative relief, and therefore, the trial court committed no error in overruling the motion to strike and the

objections to the evidence, without regard to whether the said plea would, in the absence of said cross complaint, have constituted a departure; which, however, we do not decide.

2. May 31st, 1906, plaintiff and H. A. Black were husband and wife, residing on the premises in question then owned by the husband. On that date the husband conveyed the property to plaintiff, his wife. Thereafter, about July 22nd, 1907, plaintiff conveyed the property by warranty deed to The Newton Lumber and Mercantile Company, a corporation. Under date of August 1st, 1907, said company executed and delivered to plaintiff its bond for a deed whereby it agreed to convey the property to plaintiff, or her assigns, upon the payment of certain sums of money and the performance of other conditions as therein specified. This bond was duly recorded, and on September 5th, 1907, plaintiff caused to be entered in the margin of the record of said bond the word "Homestead", and such entry was signed by her and attested in conformity with the provisions of the statute of the state relative to homesteads, and thereafter she continued to reside upon and occupy said property with her said husband and family. The value of the property in excess of prior encumbrances did not exceed two thousand dollars. After said homestead entry was made, judgment was obtained by the defendant against said H. A. Black, the husband, and under execution in said cause, levy was made upon the premises as the property of H. A. Black, sale was made and certificate issued, followed by a deed in due time, the deed, however, being executed and delivered subsequent to the bringing of this suit. The court found

that the deed from the husband to the wife was without consideration, made when the husband was insolvent, for the purpose of defeating the claims of creditors, and therefore, fraudulent as to them; that the deed from plaintiff to the lumber company was for valuable consideration; that the claim of homestead made upon the margin of the record of plaintiff's recorded title, as aforesaid, was prior to the levy of the writ of execution and effective to prevent the attaching of the lien, and entered judgment in favor of plaintiff, quieting her title against the lien of said execution and sale.

Defendant's contention is that this bond-for-deed did not and does not constitute "record title" within the meaning of the statute, upon which the homestead entry could be made, for the reason that, the deed from the husband to the wife, having been found by the court to be void as against creditors, the lumber company took no title from plaintiff and could convey none to her; and, for the further reason, that the deed from her to said company was in fact a mortgage, although in form an absolute deed, and therefore, the bond-for-deed was nothing but a defeasance, or agreement to release the mortgage, in either of which events defendant contends that the entry in the margin of the bond was ineffective to impress the homestead character upon the property. Citation of authority is not necessary to support the statement that the deed to the lumber company by plaintiff, in good faith and for valuable consideration, conveyed good title to said company unaffected by the alleged fraudulent character of the deed from the husband to plaintiff, and that the bond-for-deed given by the lumber company to

plaintiff in like good faith and for consideration, was good, and enforceable as between them. "The authorities are uniform that one who holds possession of land under an executory contract of purchase may declare a valid homestead therein".—*Northern Assurance Co. v. Stout*, (Cal.) 117 Pac. 617, 621. *Dallemand v. Mannon*, 4 Colo. App. 262. Thompson on Homesteads and Exemptions, sec. 170. Upon its face the agreement to convey, when recorded, was plaintiff's record title. That the deed from husband to wife, upon the record of which she makes a homestead entry, was, as to creditors, fraudulent and void, is no defense to, and will not avoid the validity or efficiency of, such homestead entry as an exemption, is forever settled in this state.—*McPhee v. O'Rourke*, 10 Colo. 301. *Tibbetts v. Terrill*, 44 Colo. 94. In the case last mentioned the homestead entry of the wife was made upon her deed from her husband. The supreme court, after holding that said conveyance was fraudulent and void as against creditors of the husband, speaking through Mr. Justice Bailey, said:

"As to the homestead entry of Mrs. Terrill, it is contended by appellant that it can be of no avail to Mrs. Terrill or her grantee, Alley, for the reason that the title of Mrs. Terrill, having been taken in fraud of Terrill's creditors, was void as to them and was not the subject of a homestead exemption. That does not seem to be the rule in this state. As was said in *McPhee v. O'Rourke*, 10 Colo., 301:

'Besides, it has been held that when a conveyance to the wife is made or caused to be made by the husband, for the purpose of placing the home beyond the reach of his creditors, the wife is not

precluded thereby from claiming the benefit of the homestead statute, even as against such creditors.' "

Further discussion of the question of fraud in that connection is unnecessary. It is *stare decisis*.

There is some force in the argument that the record of the bond-for-deed is not the proper, or at least the best, record upon which to make the entry in case it is admitted or proven that said bond amounts, in law, to a defeasance, or agreement to release a mortgage; yet, we are not prepared to say that where the alleged mortgage is in form a deed and the alleged release in form an absolute conveyance, or, as in this case, the bond-for-deed is in form the usual agreement given upon a purchase and sale, that entry of the homestead upon the margin of the record of such deed, or of such bond, may not be effective to impress the homestead character upon the premises, and constitute an acceptance by the debtor of the estate or privilege offered by the homestead act, and exempt the property from attachment or sale at the instance of creditors. The first section of the homestead statute is an executed grant from the state to every householder therein being the head of a family, of a homestead, not exceeding in value the sum of two thousand dollars, exempt from execution and attachment for debt. To become effective, however, this grant must be accepted by the beneficiary and his acceptance recorded. No other condition is required. The tender is perpetual, and its formal acceptance is made easy, simple and plain: "He shall cause the word 'Homestead' to be entered in the margin of his record title." The nature or extent of the estate or interest of the occupant that may

be sheltered under the provisions of the act is not specified or limited. Any interest with possession is sufficient to support the homestead right. Nor is the character of the title limited in any other respect than that it shall be of record. Twenty-five years ago the supreme court of this state, after declaring that the policy of the state is to preserve the home to the family, even as against the just demands of creditors, for the reason that the home is of paramount importance, quoted with approval the following language from the first section of Thompson on Homesteads and Exemptions: "The late Senator Benton, advocating in the United States senate the adoption of a general homestead policy, said: 'Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no Household God. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.' 'There is,' said Tarbell, J., in a case in Mississippi, 'unquestionably no greater incentive to virtue, industry and love of country than a permanent "home," around which gather the affections of the family, and to which the members fondly turn, however widely they may become dispersed.' 'The law,' said the supreme court of Iowa in an early case, 'is based upon the idea that, as a matter of public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should

have a home—a homestead—where his family may be sheltered and live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.' And this policy is characterized as 'liberal' and 'benevolent.'” In conformity with these views our courts have uniformly held that the statutory provisions are to be liberally construed for the purpose of giving effect to the principles thus enunciated.—*Barnett v. Knight*, 7 Colo., 365; *McPhee v. O'Rourke*, *supra*.

To hold that the homestead right or privilege depends upon so precarious a foundation or condition as the ability of the head of the family to determine whether an instrument, which appears to be and in form is a deed of conveyance, may in law be a mortgage; or, the ability to determine whether an instrument, which appears to be and in form is an agreement for a deed, may in law constitute a defeasance of, or an agreement to release, an instrument which appears to be a deed, but in law is a mortgage, is neither in accord with reason nor the liberal construction given to the homestead statute and acts thereunder.—*Barnett v. Knight*, *supra*; *McPhee v. O'Rourke*, *supra*; *Tibbetts v. Terrill*, *supra*; *Dallemand v. Mannon*, *supra*. Neither are we prepared to say that the question as to whether the deed from plaintiff to the lumber company was in fact a mortgage, can, in this case, be raised by the defendant. He was not a party to the transaction between the lumber company and plaintiff, nor privy thereto, nor a creditor of either of said parties. The transaction between plaintiff and said company, as disclosed by this record, is good, except when challenged by a party upon whose rights it operates in-

juriously. We do not perceive wherein it could injuriously affect defendant's rights, and he cannot be heard to complain. The lumber company was not a party to this proceeding. If the premises are actually occupied by the debtor as a homestead, and he has made his statutory acceptance and designation upon the record of an instrument which appears to be and purports to be his title, or evidence of his title, it can make no difference, so far as a creditor is concerned, by what sort of title the debtor holds and occupies such premises. The uniform holding of our courts of review that a homestead entry made upon a deed confessedly void (because executed in fraud of creditors) is sufficient to secure the exemption, would seem to justify the conclusion that an entry upon some other instrument, in form evidence of title, legal or equitable, is also sufficient, although for reasons not appearing upon the face of the instrument, the court might, when properly raised upon trial, hold that said instrument was, in law, something different than it appeared to be, or, for some reason, was defective or void.

Upon review of the entire case we conclude:

- (1) The plea of fraud in the transfer from husband to wife tenders an immaterial issue as against the homestead right, unless the value of the homestead premises exceeds the sum of two thousand dollars.
- (2) The question as to whether the bond-for-deed was in law an agreement to release a mortgage instead of an agreement to sell and convey the premises, cannot, in this proceeding, be raised by the defendant for the purpose of defeating the homestead exemption.
- (3) The record of the bond or agree-

ment for deed constituted plaintiff's "record title," within the meaning of the statute. The judgment is affirmed.

SCOTT, P. J., WALLING, J., HURLBUT, J., concur.
CUNNINGHAM, J., concurring specially.

CUNNINGHAM, Judge, specially concurring:

I cannot concur in the reasoning by which the majority of the court has reached the conclusion that the homestead exemption was properly claimed and allowed. To hold that a claim of homestead may be made upon a deed or instrument fraudulently executed, delivered and accepted, is to abrogate section 2671 R. S. pertaining to frauds and perjuries, or to amend said section by judicial construction, and thereby make it read:

"Every conveyance of any real estate or interest in land made with intent to hinder, delay, or defraud creditors of their just demands shall be void, *except where the sale is made by husband to wife, or wife to husband, and the said vendee shall claim a homestead thereon.*"

If such construction of the homestead statute shall prevail, then its title should be made to read: "An act for preventing the payment of honest debts, and for the promotion of frauds upon creditors," as was said by Mr. Justice Miller in *Pratt v. Burr*, 5 Biss., 36.

I think the reasoning in the majority opinion is opposed to the rule announced in 21 Cyc., 270, 461, 484; *Muyr v. Bozart*, 44 Ia., 499; *Long Brothers v. Murphy*, 27 Kans., 380; *Pratt v. Burr*, *supra*, and *Waples Homestead and Exemptions*, pp. 103 *et seq.*

The case of *McPhee v. O'Rourke*, 10 Colo., 301, referred to in the majority opinion, can, I think, readily be distinguished. In that case the judgment was joint—the husband and wife being each parties thereto, hence the transfer of the property from the husband to the wife could work no fraud upon their judgment creditor who could not, by such transfer, be hindered or delayed in the collection of his judgment. It matters not what the intention of Mr. and Mrs. O'Rourke may have been in the transfer of the property from the former to the latter, for, since such transfer could work no fraud, the deed was not, in a legal sense, fraudulent. The Michigan and Mississippi cases cited in the O'Rourke opinion possess no weight as authority, since in those states possession alone is sufficient to perfect the homestead claim.

It must be constantly borne in mind that Mrs. Black was not attempting to claim a homestead exemption by virtue of her marital status, but in virtue of a claim that she was the actual owner of the property, or an equity therein, in her own right. If she was such owner, then her property was not liable for her husband's debts, and no homestead exemption was required to protect it therefrom. If the title she held was fraudulent as against Brooks, then she had no title that could be seized or taken to pay her own individual debts (which is one of the tests of the right to claim the exemption), providing Brooks had intervened. The authorities are harmonious that the extinguishment of the estate terminates the homestead to which it attaches, and it must follow that until an estate has been created, the homestead claim cannot attach. The homestead

exemption itself is not an estate. It confers no title upon the claimant. It gives him protection, rather than an interest in an estate. If the claimant had no title before he made the claim, he has no color of title after such claim. There is no conveyance of land, or rather, title, in the technical allotment or setting apart of a homestead. Our supreme court, in *Tibbetts v. Terrell*, 44 Colo., 94, appears to have placed the same construction upon the McPhee case as that adopted by the majority of this court in the instant case, hence it follows that in Colorado, husband or wife can protect, by a homestead claim, their fraudulent title or titles, which, as is said in the Tibbetts case, page 101, they hold in trust for creditors. In other words, a trustee may make a claim of homestead exemption upon a trust deed. In the case under consideration, had Mrs. Black neglected or declined to make a claim of homestead exemption upon the bond for a deed, then I perceive nothing to prevent Mr. Black from having made the claim in virtue of his relation of husband, providing, of course, that the reasoning of the majority opinion be sound. True, it may be said that Mrs. Black could have made or claimed her homestead on her husband's original title, had no conveyance been made from him to her. So might the husband have made such claim upon his title, had he made no transfer to his wife. But this is not the question, and does not answer the requirements of the statute. The homestead exemption can only be claimed in virtue of the statute, and where, as in Colorado, the statute prescribes the mode of asserting the right, the statute becomes exclusive of all other methods.—21 Cyc., 270.

While it is true that homestead laws are remedial in their nature, and according to the weight of authority, must be liberally construed in favor of the debtor, still this rule does not require a strained, but a natural construction of the act affecting the purpose of its enactment, without departing from the specific meaning of its terms.—21 Cyc., 461; *Deere v. Chapman*, 25 Ill., 610; *Ladd v. Dudley*, 45 N. H., 61.

Perhaps the law ought to be that possession is sufficient to entitle one to the claim of homestead exemption, but that is not the law in this state. No one, I think, will contend that had Mrs. Black claimed her homestead exemption in a separate instrument, and filed such instrument of record that she could, under such circumstances, maintain her claim, notwithstanding by such method she would have thus given the entire world notice of her claim or intention. The only and all-sufficient reason for holding that a claim of homestead exemption made upon a separate instrument is void, is that it does not comply with the statute. No more does the claim of homestead upon the marginal record of a fraudulent title (which is no title) comply with the statute.

I agree with my brethren that the doctrine as announced in the majority opinion is *stare decisis* in this state. But, possessing boundless faith in the ultimate triumph of right, I cannot agree that the question is "forever settled in this state." For the reasons stated above, I concur specially.

[No. 3403.]

SHOLINE v. HARRIS.

1. APPEALS—*Verdict on Conflicting Evidence*, is conclusive, if no error is discovered in the admission or exclusion of evidence or the charge of the court.

2. CONTRACT—*Assent*. One who has entered into an agreement in writing for an exchange of lands, after full examination of the paper and days of deliberation, will not, as against the broker who effected the change and sues for his commissions, be heard to say that he was not satisfied with the exchange, no substantial defect appearing in the title to the lands which he was to receive, even though he subscribed the writing upon the express condition that the broker should not receive the commission unless he, the contracting party, should be fully satisfied with the exchange.

3. — *Waiver of Performance*. The parties to a contract may waive strict performance thereof.

4. INSTRUCTIONS—*Not Referring the Jury to the Evidence*. It is not required that every instruction should by express words require the jury to find "from the evidence."

5. WITNESSES—*Competency—Lawyer and Client*. The statute (Rev. Stat., Sec. 7274), was intended to protect the client against the publication by the attorney of confidential communications made by the former to the latter. Where the client voluntarily testifies as to such matters, the attorney may be examined in relation thereto.

An attorney is a competent witness in behalf of his client in the very cause which he prosecutes or defends.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

MESSRS. ANNIS & STOW, for appellant.

MR. FANCHER SARCHET, for appellee.

HURLBUT, J.

Action by appellee (plaintiff below) against appellant (defendant) to recover judgment in the sum of \$1,000.00 for commission alleged to be earned in

finding one willing to exchange real property in Denver for defendant's farm near Fort Collins.

The complaint alleged that during the month of December, 1907, defendant employed plaintiff to procure for him an exchange of certain real estate owned by him and known as the Sholine Farm, for improved city property, and promised to pay him \$1,000.00 for so doing; that in pursuance of said employment plaintiff procured for defendant an exchange of the said Sholine Farm for lots 11 and 12, block 153, Stiles Addition to Denver, with one H. E. Don Carlos, and that said Don Carlos, by his agent, George E. Ehrenkrook, and defendant contracted to make said exchange in words and figures following, to-wit:

“Denver, Colo., Jan. 2, 1908. For and in consideration of \$1.00 to me in hand paid, I will give and trade my farm containing 665 acres more or less, known as the Sholine Farm, together with all water rights, laterals, ditches, reservoirs and water contracts of whatever nature together with all improvements thereon, subject to an incumbrance of \$11,000.00 at 7 per cent., about three miles north of Fort Collins in Larimer Co., Colo., for the apartment building in Denver, Colo., upon lots numbered 11 and 12, in block numbered 153, Stiles Add. to Denver, subject to incumbrances of \$15,000.00 at 6 per cent. It is agreed that each party pay their taxes up to the first of Jan., 1908. Abstracts to be furnished and warranty deeds to be executed by each. Deal to be closed on or before Feb. 1, 1908, at 419 Colorado Bldg., Denver, Colo.

\$12,000.00 at 6 per cent. due May 9, 1910, can be paid off by paying 3 months' interest in advance.

\$3,000.00 at 6 per cent. due May 9, 1910, on or before any part.

(Signed)

HANS M. SHOLINE,
CHRISTINA SHOLINE,
GEORGE B. EHRENKROOK,
Agt."

Defendant answered, admitting execution of the contract of January 2nd, but alleges that it was further understood between the parties thereto that the property therein described should be a good merchantable title, and denies the other allegations of the complaint; and as a second defense sets out that plaintiff and defendant entered into an agreement for the exchange of the property, but claims that the exchange should be entirely satisfactory to defendant and his wife, Christina Sholine, and that plaintiff was not to receive the thousand dollars unless the exchange was satisfactory as stated, and further alleges that at the time the contract was signed representations were made by Ehrenkrook that an incumbrance of \$15,000.00 then existed on the Denver property; and further that his attorney informed him that the title to the Denver property was not a good merchantable title; that there was a mortgage of only \$12,000.00 on the property, and that he afterwards ascertained from plaintiff and Ehrenkrook that the additional \$3,000.00 was to be placed thereon at the time of the consummation of the deal, and alleges on information and belief that the latter sum was to be divided between plaintiff and Ehrenkrook; that on account of the misrepresentations concerning the amount of the incumbrance and the alleged fraud defendant refused to com-

plete or consummate the exchange according to the contract. Plaintiff filed a reply denying all allegations of new matter set up in the answer. The jury found the issues in favor of plaintiff and returned a verdict of \$1,000.00 upon which judgment was entered and the case is here for consideration.

All the issues made by the pleadings were sharply contested at the trial and unless the record shows error in the giving or refusing of instructions by the court or the admission or rejection of testimony or proofs, this court is concluded by the verdict of the jury, under the well established rule that the verdict of a jury based upon controverted facts will not be disturbed as contrary to the evidence.

We have carefully examined appellant's brief as to his objections concerning the admission and rejection of testimony by the court, to which exceptions were duly reserved, but we fail to find any error in the rulings of the court in that behalf.

Appellant contends that the refusal of the court to give the following instruction was prejudicial to him and that the same was reversible error, to-wit:

"The jury are instructed that if you find and believe from the evidence that the agreement between plaintiff and the defendant concerning the commission of the plaintiff was that the defendant and his wife, Mrs. Sholine, were to be fully and entirely satisfied with the trade in question at all times prior to the final closing thereof, and that the payment of the commission of the plaintiff depended thereon, and you further find that this defendant and his wife, Mrs. Sholine, were dissatisfied, and for that reason refused to carry out and consummate

the transfer in question, then you must find for the defendant."

From the view we take of the issues we do not think the court erred in excluding this instruction. The evidence clearly shows that the defendant Sholine had the contract in his possession for several days, thinking it over, before he signed it. In his direct examination he testified: "It was shortly after the second of January, 1908, that I signed it. There was several days I was studying about this. I did not sign it the day it was made. I kept it in my possession several days before I signed it." And again on cross-examination: "I carried it three or four days to think it over, and then signed it and signed my wife's name to it, and then I went to Judge Ballard's office and asked him to draw a deed to these people. * * * I studied the contract three or four days before I signed it." Defendant's wife, on the witness stand, testified: "The first time I looked at this property my husband and I went down with Mr. Harris. * * * We looked it over and subsequently I went down myself and looked it over again, * * * came back and reported to my husband what I had seen. My husband signed the agreement afterwards. * * * went down again to the office of Mr. McCrimmon and Ehrenkrook to see the abstract with my husband. We were to close deal but the abstract was not ready. Mr. Harris told us not to sign notes until we had examined the abstract."

The testimony also shows without contradiction that prior to the signing of the contract defendant and his wife visited the property in question a number of times, examined the premises, and called for

and received a full statement as to who were the tenants and what amount of revenue per month the property was yielding from rentals. Both defendant and his wife appear to have taken all the time they desired to examine the Denver property and to decide as to whether or not they would make the exchange, after which they deliberately signed the contract. Under these circumstances, in the absence of fraud or mistake, defendant should be held to his contract. Plaintiff's commission was due and payable when this contract was formally signed, unless it appears that the Denver property lacked a good and merchantable title, or some other defect of like import existed. After having had every opportunity to study the matter over and to examine minutely into the physical condition of the property as well as its rentals and revenues before signing the contract, neither defendant nor his wife should be heard to say thereafter that they were not satisfied with the exchange so far as plaintiff is concerned. About the only reason we can discover why defendant failed to carry out the contract of exchange was a vague belief on his part that there was something crooked about the deal. But on the witness stand he failed to show upon what grounds such belief was founded. He testified that the reason he did not make the exchange under the contract was his discovery of a lien of \$12,000.00 on the Denver property instead of \$15,000.00, misrepresentations made by Ehrenbrook to the effect that there was an incumbrance at the time of \$15,000.00 on the property, and that his attorney told him the title was clouded and not merchantable. He did not claim that he refused to carry out the contract be-

cause the title to the property was defective, and even if the answer sufficiently pleaded that defense, there is not a particle of testimony to sustain it. The testimony of the witness Ballard (defendant's attorney at the time of the transaction), does not amount to legal proof of defective title of the Denver property. Under the evidence the court was clearly justified in excluding the instruction from the jury.

The objections urged to the instructions given, fail, in our judgment, to point out any serious or reversible error in the giving thereof. The instructions taken as a whole seem to fairly present the case to the jury.

Instruction No. 3 reads as follows:

"Notwithstanding the contract calls for an incumbrance of \$15,000.00 payable as provided therein, still it was in the power of the parties to waive strict performance of said contract and to agree upon a shorter time or different one for the payment of the \$3,000.00, and if you find that they did afterwards so waive and consent to a different payment, that would make no difference as to the plaintiff's right to recover if he is otherwise entitled to a verdict."

The objections urged to the giving of this instruction by the court are not tenable. The contract itself provided that an incumbrance was to be upon the Denver property of \$15,000.00, and contained a statement as to how it could be paid, to-wit, \$12,000.00 at 6% could be paid off entire at any time by paying three months' interest in advance; \$3,000.00 thereof at 6% "on or before any part." This last phrase is ambiguous and not easily un-

derstood. We presume it was meant that any part of that amount could be paid before due. The instruction properly stated the law when it recited that the parties to the contract could subsequently waive strict performance of the same and agree upon different terms than those expressed therein. This is a statement of a well-known legal proposition.

Plaintiff also objects to that part of the instruction which reads, "If you find that they did afterwards so waive," etc., without inserting after the word "find" the phrase "from the evidence." We discover no serious error in this omission. We think the following excerpt from *Gorman v. People*, 17 Colo., 596, is applicable to the point raised, viz.: "We are not to be understood as holding that it is necessary in every instruction to say to the jury that they must believe '*from the evidence*,' but the charge when considered as a whole, ought to be so clear in this respect that intelligent men will have this principal of law clearly before them when deliberating upon a verdict, particularly in criminal cases. It is doubtful, however, if this judgment should be reversed solely on account of such an omission in the charge. Jurors generally understand that they are to decide all cases solely upon the evidence introduced at the trial," etc.

The first instruction given by the court informs the jury that "if they find and believe *from a preponderance of the evidence* that plaintiff employed Harris," etc. It may be also remembered that when a juror is examined on his *voir dire* he is generally asked if he will render a verdict based solely upon the evidence produced at the trial and the law as given by the court. This fact, as well as the form

of the oath administered when sworn as a juror, would indicate that a juror fully understands his duty in that respect, and that his deliberations and findings should be based wholly upon the testimony adduced on the witness stand.

Counsel also contend that the evidence of the witness Ballard was not competent testimony in this case, and reversible error was committed by the court in admitting the same against defendant's objections. It is admitted that at the time the contract was signed he was acting as attorney for defendant, but appeared at the trial as attorney for plaintiff. Our attention is cited to sec. 7274, Revised Statutes, 1908, a part of which reads as follows: "An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment." The purpose of this statute is to protect the client against publicity as to admissions or statements made by him to his attorney while the relation of client and attorney exists between them, and is undoubtedly for the benefit of the client. However, when the client sees fit to voluntarily appear in a court of justice and testify under oath as to such statements or admissions, there is no longer any reason for the application of the rule, and we believe it is the universal practice, when such a situation exists, to permit the attorney to be examined fully in relation thereto. Our supreme court seems to have approved of such practice. We extract the following excerpt from *Fearnley v. Fearnley*, 44 Colo., 417, viz.: "The object of the statute is to extend to the client the privilege that his communication shall

not be disclosed without his consent. It is a personal privilege and if he makes the disclosure himself it ceases to be a secret. The defendant testified to what transpired between her husband, Mr. Dunklee, (her attorney) and herself. By so doing she made it public, and thereby waived her right to object to Mr. Dunklee giving his own account of the matter. *Hunt v. Blackburn*, 128 U. S., 464; *State v. Madigan*, 66 Minn., 10."

Another question raised by appellant remains to be considered, and that is as to the propriety of an attorney, who is conducting the case for one party to an action, testifying as a witness in such case. This was not error. *Goldsmith et al. v. Newhouse, Trustee*, 19 Colo. App., 1. In this case the interrogation of the witness Ballard, having been directed only to an explanation of a matter previously testified to by his former client, suggests to our mind no reversible error.

In addition to what has heretofore been said, this record appears to show fair and honorable action throughout on the part of plaintiff in his dealings with defendant. In fact he seems to have placed his desire to have defendant treated fairly in the exchange of his property above that of obtaining commissions for his services in the premises. Defendant's wife testified that plaintiff advised herself and husband not to sign the notes (being part of the transaction of exchange) until they had first caused the abstract of title to the Denver property to be examined.

Failing to discover any reversible error in the record, the judgment will be affirmed.

Judgment affirmed.

[No. 3415.]

LOWREY ET AL. V. HARLOW.

1. *EXECUTOR—Authority After Discharge.* After his discharge the executor has no authority to act for the estate of the testator in any manner.

2. *MORTGAGE—Statute of Limitations.* One who, by inheritance or purchase, takes title to lands with notice of a mortgage existing thereon, and by payments upon the mortgage indebtedness and other acts, within the period of limitation, admits the existence of the mortgage lien, will not be permitted to plead the statute of limitations to a bill to foreclose the mortgage, even though at the institution of the foreclosure bill the mortgage indebtedness is barred by the statute and no personal judgment could be recovered against the one making such payments.

3. — *Payments by Parent—Effect as to Minor Child.* As a general rule, a minor can do no act and make no admission which binds him, nor can the parent acting for him.

The mother taking by the will of her husband a three-fourths interest, undivided, in lands, makes payments of interest upon a mortgage thereof. Such payments have no effect to stay the course of the statute as to a minor child who takes the other undivided fourth of the lands by inheritance.

4. *WILL—Posthumous Child—Abatement of Legacies.* Testator leaving a widow and one child devises all his estate to his widow, not expressing any intention to disinherit an after-born child. A child is born after his decease. The posthumous child takes one-fourth of the lands whereof the testator died seized. (Mills' Stat., Sec. 4659, Rev. Stat., Sec. 7073.)

Appeal from Boulder District Court. HON. JAMES E. GARRIGUES, Judge.

MR. H. N. HAWKINS, MR. PRINCE A. HAWKINS,
MESSRS. DOWNER & HAWKINS, MR. L. O. HAWKINS,
for appellants.

MESSRS. GIFFIN, ROWLAND & GIFFIN, for appellee.

HURLBUT, J.

September 11, 1907, appellee (plaintiff below) commenced suit to foreclose a mortgage of \$3,500.00 executed by Mary T. Lowrey as executrix of the last will of Charles E. Lowrey, deceased. Appellants were made defendants. The mortgage was founded upon a note of equal amount given the same day by the executrix, payable to the order of William Connel, mortgagee.

The amended complaint as well as the undisputed facts show that Charles E. Lowrey died August 19th, 1894, leaving the lots in suit; that he left a will dated December 14th, 1892, devising all his property to his widow, Mary T. Lowrey; that letters testamentary were issued to his widow as executrix of his estate on September 6th, 1894; that upon petition duly presented the county court authorized and empowered the executrix to borrow \$3,500.00 for the purpose of paying debts of the estate, and to execute a mortgage upon the lots to secure payment thereof; that the executrix borrowed the money from William Connel and executed a mortgage and note as executrix for \$3,500.00, both dated December 3rd, 1894, the note payable to the order of Connel in five years, with interest at 7% per year; that on January 5th, 1895, the county court of said Boulder county, by order, approved the note and mortgage above mentioned; that on January 16th, 1902, said county court entered its decree closing said estate, and therein approved the final report of said executrix and entered her discharge as such, and at the same time adjudged said executrix to be the sole legatee under the will; that, at the time said estate was so closed, the indebtedness described in said mortgage had not been paid,

nor any part thereof; that on December 22nd, 1902, Connel assigned said note and mortgage to Charles W. Fulton, who at that time extended to said Mary T. Lowrey the time for the payment of said note and mortgage until December 22nd, 1903, and afterwards again extended the time of payment thereof until August 29th, 1904; that on February 29th, 1904, said Fulton, for value, assigned said note and mortgage to plaintiff; that at the time suit was brought said note was long past due; that twelve payments of interest upon said note were paid to said Fulton by Mary T. Lowrey during the year 1903; and in August and September, 1904, and April and May, 1905, she paid to the holder of the note interest thereon aggregating \$213.00; and that said Mary Lowrey was a minor of the age of fourteen years when suit was commenced.

Separate answers were filed by defendants, admitting the execution of the note and mortgage as alleged in the complaint, and pleading among other defenses the six years statute of limitations and the statute of frauds as to special promise to answer for the debt default or miscarriage of another.

The following additional facts were shown by the record: Mary T. Lowrey, decedent's widow, and Annie Lowrey, his daughter, were living at the time he executed the will, but Mary Lowrey was born thereafter but before the death of her father. There is nothing in the will which indicated an intention to disinherit the unborn child. The testator, at the time of his death, possessed eight lots in University place in Boulder, and was constructing a residence and stable thereon. He had previously arranged with one Connel to borrow \$3,500.00 to

complete the buildings, and prior to his death had received \$1,000.00 of that amount from Connel.

The decree of the county court closing the estate found that all debts and claims against the estate, including cost of administration, had been paid in full, leaving no balance in the hands of the executrix.

On November 15th, 1902, Mary T. Lowrey paid the entire interest due on the note up to that date, and she afterwards made payments of interest thereon as above stated. The First National Bank of Boulder loaned Charles W. Fulton \$3,500.00, and the note in suit was turned over to the bank as collateral security for the payment of that loan. This \$3,500.00 was afterwards paid to the bank by plaintiff, whereupon the note was indorsed to her by said Fulton. The interest above referred to was paid by Mary T. Lowrey while the note was in the possession of the bank and also while it was in the possession of plaintiff as owner of the same. Mary T. Lowrey testified that she paid to the owners of the note all the interest shown by indorsements thereon, and that such indorsements correctly show the amounts and dates when paid.

Annie Lowrey, one of the original defendants, need not be considered on this appeal, having withdrawn or failed to prosecute her defense to the action.

The above is an epitome of the evidence and proofs as disclosed by the record.

Thirty-five assignments of error appear on the record, only two of which are relied upon and seriously discussed in the briefs by counsel, to-wit, the six years statute of limitations and the statute of

frauds above mentioned. As to the first assignment of error mentioned, appellants' position and contention are that at no time did the estate, or the executrix (as such) pay any part of the note or interest due thereon; that all the payments of interest above mentioned, upon the note, were made by Mary T. Lowrey as an individual and not in her representative capacity; that she secured the money to make these payments of interest in various ways, such as renting of rooms, appropriation of moneys paid to her daughter Mary from her separate property, etc. The decisive point of contention is that, the note and mortgage being a debt executed by Mary T. Lowrey as executrix, no payment of interest upon the note by either of them in their individual capacity would toll the statute of limitations as to them, particularly the daughter, she being a minor and not having paid through a legal guardian any part of such interest. Appellants further contend that even if their position is not wholly good as to Mary T. Lowrey, it is certainly good as to Mary Lowrey for the reason as stated that no payment of interest on the note was ever made by a legal guardian or other person authorized by law to bind her by such payment.

No question arises in this case as to the extent of authority of a representative of an estate to revive a debt of the testator already barred by the statute of limitations, nor as to the authority of such person to toll the statute of limitations by part payment upon the testator's debt prior to the time the statute becomes operative, for the reason that the mortgage note was not the debt of the testator and strictly speaking was not the debt of the estate.

This debt was contracted in the most solemn form. The executrix filed a sworn petition showing that buildings under process of construction by the testator in his lifetime were incomplete at the time of his death and that contractors were threatening to file mechanics liens against the property, and asked permission to borrow \$3,500.00 and secure the same by mortgage upon the lots, in order to pay the debts of the estate, including the building debts. The court, after listening to testimony, entered a formal order granting the petition. It can be said without contradiction that neither the estate nor executrix (as such) paid anything on this note. Therefore it would appear that action thereon was barred by the statute of limitations at the time this suit was commenced. On November 15th, 1902, the first money was paid on said note to the holder by Mary T. Lowrey, this payment being the entire interest due thereon at that time. We think appellants' counsel are correct in their statement that the payments of interest by Mary T. Lowrey were in her individual capacity, for it must be conceded that after her discharge as above stated her relations with the estate as executrix were entirely severed and she had no authority thereafter to act for or on behalf of the estate in any manner.

The full title to the property in suit passed by the terms of the will and operation of law to the widow, Mary T. Lowrey, and her daughter, Mary, who owned and possessed the property at the time the mortgage was given and suit commenced. On November 15th, 1902, Mary T. Lowrey executed a trust deed upon the property in question to Elbert Greenman, trustee, to secure a note of \$250.00 which

she had given to S. A. Greenwood and C. I. Terwilliger, which deed *recited therein that the same was given subject to the mortgage under consideration.*

Did the payments of interest on the note by Mary T. Lowrey, the record of the executrix's mortgage, the clause in the mortgage of November 15th, 1902, reciting that it was given subject to the executrix's mortgage, and the testimony, taken together, arrest the running of the statute of limitations against foreclosure proceedings on the executrix's mortgage? In answering this question we will first discuss the effect on Mary T. Lowrey only.

Appellants' counsel vigorously contend that the case of *McGovney v. Gwillim*, 16 Colo. App., 288, is decisive of this case, and that it reasons the invalidity of the decree of the lower court. The case cited is well known to the profession. It reaches the conclusion that in Colorado a mortgage is an incident only to the debt which it secures, the debt being the principle thing, the mortgage only incident thereto; that if the debt is barred by the statute of limitations no action can be maintained to foreclose the mortgage securing it. This case has since been frequently referred to by our appellate courts. The case at bar, being also an action to foreclose a mortgage, and the note being barred by the statute of limitations, it would at first seem as though plaintiff might be precluded from maintaining this action. The supreme court in *Medina v. Phelps*, 39 Colo., 92, refers to that case, but distinguishes the two as to the record upon which the decisions were respectively rendered. The facts of the *Medina-Phelps* case can be briefly stated as follows: Davis,

the owner of the property, had given a trust deed upon the same to secure a note executed by him. Afterwards, by *mesne* conveyances, the title passed to Mitchell by warranty deed, therein reciting that the same was subject to the deed of trust mentioned. Afterwards Mitchell paid \$1,100.00 on the principal, and interest thereon up to January 1st, 1902. After receiving the title he executed a mortgage to one Charlton for \$2,000.00, which also recited that the same was subject to the said deed of trust, and thereafter executed a warranty deed for the property to Medina, but made no mention therein of the deed of trust. Both the deed of trust and mortgage were on record at the time Medina took his title. After the deed had been given to Medina by Mitchell, suit was brought by Medina to restrain Phelps, trustee in the trust deed, from advertising and selling the property therein mentioned. He secured a writ of injunction in the district court. At the trial Medina contended that the payments made by Mitchell upon the trust deed note before he sold him the property did not arrest the running of the statute of limitations against foreclosure proceedings on the trust deed as against him, and that as the note was barred foreclosure proceedings were also barred. The district court ruled against him on this point and dismissed the suit. On appeal the supreme court sustained the ruling. It was conceded at the trial that the statute of limitations had barred the trust deed note, but the trustee contended nevertheless that he had a right, under the evidence, to foreclose the trust deed notwithstanding that fact, and the supreme court sustained his position. The court, speaking through Justice Maxwell,

said: "It follows that the only question to be disposed of under the facts of this case is: Can a sale under the deed of trust be executed, although a right of action on the note secured by the deed of trust is barred by the statute of limitations? In support of a negative answer to this question, appellant relies upon *McGovney v. Gwillim*, 16 Colo. App., 284, where it was held that an action to foreclose a mortgage or deed of trust is barred by the statute of limitations when an action on the note is barred, to secure the payment of which the mortgage or deed of trust was given. The *McGovney-Gwillim* case is distinguishable from the case at bar. In that case there is nothing in the record to show an intention upon the part of any one to keep the lien of the deed of trust alive so as to make it a charge upon the property to the extent of paying the unpaid balance of the note. In the case at bar, the deed to Mitchell, appellant's grantor, and the mortgage made by Mitchell to Charlton, above referred to, were both 'subject to the deed of trust,' and were both of record, so that appellant had constructive notice that his grantor had acknowledged the validity of the deed under which he claims title. It is beyond dispute that it was the intention of Mitchell that the lien of the deed of trust was to be kept alive for the purpose of securing the payment of the unpaid balance of the note. The recital in the deed to Mitchell that it was 'subject to the deed of trust,' his payments upon the principal of the note and the interest to January 1, 1902, his securing an extension of the note and reduction of the interest and profiting by such reduction, the mortgage to Charlton, and his testimony hereinbefore set forth, clearly es-

tablish this fact. Appellant, with constructive notice of the existence and validity of the deed of trust by the record and the record of the Charlton mortgage and by the acts of his grantor, succeeds to the estate, sits in the seat of his grantor, and takes subject to the incumbrance. * * * We believe that the acts of Mitchell, appellant's grantor, constitute an admission that the land is subject to the deed of trust, and an engagement for the satisfaction of the balance of the note secured thereby out of the mortgaged premises, and operate to suspend the running of the statute of limitations against proceedings to foreclose the deed of trust, and that under the facts of the case appellant stands in no better position than Mitchell." In this case the court cites: *Perkins v. Adams*, 16 Colo. App. 96; *Starbird v. Cranston*, 24 Colo., 20; *Schmucker v. Sibert*, 18 Kan., 104; *McLane v. Allison*, 60 Kan., 441.

In the *McGovney-Gwillim* case *no payment was claimed to have been made upon the note at or after its maturity*, while in the *Medina-Phelps* case Mitchell *had made payments of both principal and interest upon the note secured by the trust deed within the period of the statute of limitations before he had sold the property to Medina*. It is well to notice at this point that in the *Medina* case the parties were in court, and the decree of the district court recited among other things that if the trustee should at any time proceed to sell the property under his power he should make certain allowances and deductions as between the parties concerned.

In reasoning back from this case of *Medina v. Phelps* to the one at bar, it would appear that Mary T. Lowrey stood in the position of Mitchell. Mitchell

obtained his warranty deed from the record owner, it being subject to a trust deed. Mary T. Lowrey obtained her title by the will, the property being subject to a mortgage which had been executed at her own solicitation as executrix. No personal judgment could have been rendered against Mitchell, or Medina, his grantee. No personal judgment could have been rendered against Mary T. Lowrey. The trust deed note secured by trust deed on Mitchell's property was barred by the statute of limitations at the time the suit was commenced. The mortgage note secured by mortgage on Mary T. Lowrey's property was barred by the statute of limitations at the time suit was commenced. Mitchell had made partial payments upon the trust deed note within six years of the commencement of the action concerning its foreclosure. Mary T. Lowrey had paid interest upon the mortgage note within six years prior to the commencement of the foreclosure suit. The property conveyed to Mitchell by warranty deed was subject to the said trust deed. The property vested in Mary T. Lowrey was subject to the mortgage. The mortgage from Mitchell to Charlton contained a clause that the same was given subject to the said trust deed, both of said instruments being of record. The mortgage given November 15th, 1902, by Mary T. Lowrey to Greenman, trustee, contained a clause that the same was subject to the executrix's mortgage, both of said instruments being of record. Mitchell had secured an extension of the trust deed note and thereafter paid interest thereon. Mary T. Lowrey had secured two extensions on the mortgage note and thereafter paid interest thereon. It would be

hard to find two cases involving facts so nearly similar in their main features.

We think the rule laid down in *Medina v. Phelps* is applicable in this case, and confess satisfaction at being able to so interpret it, for the reason that it comports with our views of equity and sound judicial reasoning.

We do not accord the same sweeping interpretation to the opinion in *McGovney v. Gwillim*, *supra*, as that given to it by appellants' counsel. That opinion was based upon the facts before the court, and we have serious doubt as to the able writer thereof meaning by the language used, that in all cases and under all circumstances an action to foreclose a mortgage or trust deed is barred by the statute of limitations when the debt secured thereby is so barred. In fact the following excerpt from the opinion seems to negative that construction, viz.: "The note matured March 28, 1890, and *no payment is claimed to have been made upon it at or after its maturity*," etc. If the statement just quoted could be applied to the case at bar a few lines only would suffice to dispose of this appeal. We might further say that if the same statement would have been justified in the *Medina-Phelps* case the appellee would probably have met the same fate as did the appellant in the *McGovney* case. In the former case the supreme court distinguishes the two in this language: "In that case (*McGovney v. Gwillim*) there is nothing in the record to show an intention upon the part of any one to keep the lien of the deed of trust alive so as to make it a charge upon the property to the extent of paying the unpaid balance of the note."

Jones on Mortgages, 6th ed., sec. 1198, cites *McLane v. Allison*, 60 Kan., 441, in support of that part of the text which reads as follows: "A payment by a purchaser from the mortgagor is a binding admission that the land is subject to the mortgage and operates to suspend the running of the statute of limitations against a foreclosure of the mortgage." Our supreme court cited this case with approval in rendering their opinion in *Medina v. Phelps*, and we have not been convinced of any weakness in the rule there laid down.

It cannot be presumed that the payments of interest on the mortgage notes year after year by Mary T. Lowrey were for any other purpose than to keep alive the lien of the mortgage, and thus postpone the evil day of foreclosure, in the hope that in the fullness of time she would become able to remove the burden from the property which during all those years had provided her with an abiding place for herself and family. Certainly it cannot be successfully contended that justice would be better subserved under the facts in this case by punishing the mortgagee for his forbearance by denying him the right of foreclosure.

Much has been said in the able briefs of counsel on both sides concerning different phases of the case, which, by reason of the conclusions we have reached, it becomes unnecessary to notice. The cases of *Gibson v. Lowndes*, 28 S. C., 285; *Bolt v. Dawkins*, 16 S. C., 198; *Warren v. Hearne*, 82 Ala., 555, and some others cited by appellants' counsel, are not in point. We have read them carefully and find they all had under consideration situations that do not obtain here, the salient question discussed

and decided in those cases being: Could the heirs devisees or legatees toll the statute of limitations as to an ancestor's debt by making partial payments thereon during the period of limitation? The courts held that such payments would not have that effect. This is undoubtedly the general rule in this country. As we read those cases none of them touched the controversy we are here considering. The question before us is: Can one receiving title to real estate by inheritance or purchase, upon which a mortgage exists at the time title is taken, and having knowledge thereof, plead the statute of limitations to a foreclosure proceeding of the mortgage, when such one has made part payments upon the debt within the period of limitations, although at the time suit is commenced the mortgage debt is barred by such statute and no personal judgment could be obtained against the one making such payments?

Our conclusions are that Mary T. Lowrey, having known of the existence of the executrix's mortgage, and having executed the mortgage of November 15th, 1902, containing a recital that the same was subject to the executrix's mortgage, and having made payments of interest on the mortgage note to within a period of two years of the commencement of this suit, and having testified that she paid such interest because she believed litigation would follow if she did not, evinced an intention on her part to keep alive the lien of the mortgage for the purpose of securing the unpaid balance of the note, and that such acts constituted an admission that the land was subject to the mortgage and an engagement for the satisfaction of the balance of the note secured thereby out of the mortgaged premises, and

operated to suspend the running of the statute of limitations against the proceedings to foreclose the mortgage, and that as to her three-fourths interest in the mortgaged premises the same should be foreclosed.

Our conclusions as above expressed make it unnecessary to consider defendant's plea of the statute of frauds, sec. 2025 Mills' Annotated Statutes, relative to a special promise to answer for the debt of another, etc.

Mary T. Lowrey made the payments of interest on the note of her own volition, and for her own benefit. She did not assume the indebtedness of the mortgage note and could not be subjected to a personal judgment therefor. Doubtless such payments by her were for the purpose of keeping the lien of the mortgage alive and postponing foreclosure proceedings.

We will next consider the situation as to the rights of the minor daughter Mary. As above stated, she was born after the will was executed. There was no expressed intention therein shown to disinherit any unborn child. Sec. 4659, Mills' Annotated Statutes, reads as follows: "If, after making a last will, a child or children shall be born to any testator or testatrix, and no provision be made in such will for such child or children, the will shall not, on that account, be revoked; but unless it shall appear by such will that it was the intention of such testator or testatrix to disinherit such child or children, the devise and legacies by such will granted and given shall be abated in equal proportions, to raise a portion for such child or children, equal to that which such child or children would have been

entitled to receive out of the estate of such testator or testatrix, if he or she had died intestate." It is clear that under this statute the property devised to the widow under the will must be abated to the extent of a one-fourth interest therein, that being the interest which the minor would have inherited had her father died intestate.

There is no question that the minor never paid any part of the interest shown to have been paid on the mortgage note. Nor was any such payment ever made for her by any one lawfully authorized to do so. It is true the evidence shows that the mother, Mary T. Lowrey, paid some of the interest on the note out of the separate funds or estate of such minor, but the same was not sanctioned by law and could not bind her or her estate. We are at a loss to discover upon what theory the payments on the note by the mother can be said to estop the minor from pleading the statute of limitations to the foreclosure proceedings. Under certain exceptions (not existing here) the minor had no power whatever to make a contract that would be binding upon her, however solemn the proceedings might be attending the transaction. Probably no one but a legal guardian formally appointed by a competent court could do that. In all civilized countries the law exercises a constant vigilance over the property rights of minors. Civilization would be a failure if the property of children under the age of discretion were not so guarded. Adults frequently experience trouble in evading loss of property by being overreached through the cunning of men who take advantage of their lack of experience and judgment. What chance then has a mere child to have

its property rights conserved during its minority, unless the power of the government, through its judiciary, assumes this duty? It is clear that this minor had the care and attention of a devoted mother, who at all times did what she deemed best for the child's interest, and although the payments made by her from the child's funds were made in the utmost good faith, they were not binding on the child or her estate.

None of the cases cited by counsel in any of the briefs deal with a situation similar to the one existing here, and we have been unable to discover any. The whole theory of the ruling in *Medina v. Phelps*, *McLane v. Allison*, and other like authority, is based upon the fact that in cases of this kind those who succeed to the mortgagor's title have voluntarily done some act or made some admission concerning the secured debt which estops them from invoking the statute of limitations against a proceeding to foreclose the security, even though the secured debt be barred by the statute. How can it be said that a minor can do any act or make any admission under such a situation that in law would be binding upon it, or prevent such minor from disaffirming the same when it arrives at lawful age? Appellee in all probability could have avoided the condition in which he finds himself had he taken the precaution to secure a legal guardian and an order from a competent court authorizing payment of interest on the mortgage note from the minor's personal funds.

We realize that the conclusions we have reached may work a hardship on appellee. This court would not feel grieved if it could see its way to affirm the

decree as it stands. We are constrained to hold that the able jurist who decreed the interest of the minor Mary to be sold to satisfy the mortgage note, erred in that respect.

The judgment will be reversed with instructions to modify the decree by excluding from sale the one-fourth interest in the property belonging to the minor Mary Lowrey.

Judgment reversed with instructions.

[No. 3428.]

SALISBURY ET AL. V. LAFITTE.

1. *PLEADINGS—Construction.* On general demurrer the complaint must be liberally construed. General allegations showing a right of action suffice.

2. — *Answer—Evasive Denials.* The first defense of the answer traversed every allegation of the complaint "except as expressly herein admitted." Nothing indicated what was intended by this exception. Held evasive, if attacked by demurrer or motion; but no exception being taken to it, it was accepted as putting in issue the material allegations of the complaint.

3. — *Answer—Separate Defenses,* must each be regarded as if standing alone, and complete in itself, unless it distinctly and intelligently refers to what is elsewhere stated.

4. — *Conclusions of Law.* An averment that the court in which a certain judgment was rendered "was without jurisdiction to render the judgment" is a mere conclusion of law.

5. — *Certainty—Relevancy.* The complaint alleged that a certain promissory note had been levied upon by the sheriff under garnishee process in favor of defendant and against plaintiff, and by order of the court had been turned over to the sheriff for sale, that defendant prevented the sale and induced the sheriff to turn the note over to him, and converted it. Neither the complaint nor the answer suggested that defendant claimed the note through any execution sale. Averments of the reply that defendant "never recovered any judgment" against plaintiff, and "no execution ever issued against her," held irrelevant and immaterial to the defenses presented by the answer.

So, averments of the reply that defendant "never became the owner" of a certain judgment, nowhere else mentioned or alluded to, or in any way connected with the supposed right of action.

6. — *Judgment on the Pleadings*. Even though the defendant moves for judgment on the pleadings, and his motion is denied, he cannot be condemned in damages, without evidence, where he has interposed the general denial.

7. JUDGMENTS — *Presumption of Jurisdiction*. Whoever would question the judgment of a court of general jurisdiction for want of jurisdiction of the person must definitely negative every fact and process by which jurisdiction might have been obtained. A mere averment, in questioning a judgment reviving a former judgment, that "no order to show cause why said judgment should not be revived was ever issued," not denying the service of process in other form, or voluntary appearance, is wholly insufficient.

8. — *Presumption of Regularity*. Nothing appearing to the contrary, it must be presumed that the district court in permitting the filing of a substituted return to a writ previously executed, and lost from the files, acted in the due exercise of its lawful powers.

9. APPEALS—*Questions Not Presented Below*, will not be considered.

10. — *Entire Judgment Against Two Erroneous as to One*, will be reversed as to both.

11. MAXIMS—*Wrong-doer Shall Not Have Advantage of His Own Wrong*. A promissory note is in the hands of the sheriff, to be sold on execution against the payee. The plaintiff in the execution prevents the sale and induces the sheriff to deliver the note to him. In an action by the payee for the conversion of the note, he will not be heard to say that it is in the custody of the law.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. J. C. GUNTER, Mr. J. M. MAXWELL, for appellants.

No appearance for appellee.

Judgment reversed.

WALLING, J.

In the district court, the appellee, plaintiff in the action, recovered judgment against the defendants therein, Salisbury and Wildeboor, who have appealed from that judgment.

1. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and that objection being renewed here by a suitable assignment of error, it will be considered at the outset. The complaint, which was filed August 27th, 1907, was one to recover damages for alleged conversion by the defendants of a promissory note, secured by deed of trust on real estate, executed to a public trustee. The objections urged against the sufficiency of the complaint are: *First*, that it failed to show that the plaintiff was in possession, or had the right to immediate possession of the note at the time of the supposed conversion; *second*, that it did show that the note and trust deed were *in custodia legis*, at the time of the alleged conversion thereof, and consequently, that plaintiff could not have had such possession or right of possession, as would sustain her subsequent action for conversion of the same. Neither of these objections appears to be valid. The first is based upon the initial allegation of the complaint, that "she (plaintiff) is the owner and entitled to possession of" the described note. But the sufficiency of the complaint cannot be determined from that allegation alone. It was further therein alleged that the note and trust deed were levied upon by the sheriff of Pueblo county, "and garnished in the hands of said public trustee, who then had possession for the purpose of foreclosure" and that the same were given over to said sheriff by

order of court, upon an execution in favor of defendant Salisbury against the plaintiff, "to be sold by the sheriff and proceeds applied on said execution or judgment;" and that Salisbury wrongfully prevented the sale of the note, and induced the sheriff to turn over to him the note and trust deed, and, after that was done, "wrongfully and fraudulently converted said note and deed of trust to his own use and benefit," etc. Construing the complaint liberally, as we are bound to do upon this demurrer, it appears therefrom, in a general way, that the securities in controversy were taken from the possession of plaintiff's bailee, by garnishee process under execution against appellee in favor of Salisbury, and, pursuant to an order of the court out of which the process issued, turned over to the sheriff for sale, the proceeds to be applied on the execution; and that Salisbury in some manner induced the sheriff to turn the note and trust deed over to him, without any sale, and thereupon converted the securities to his own use. If these allegations are true, Salisbury was clearly liable to appellee for the wrongful conversion of the securities; and it could not avail him to say that they were in the custody of the law, by virtue of the levy and garnishment proceedings, under execution, if he in fact obtained possession of the securities, by inducing the sheriff to violate his duty under the order of the court and the writ.

It was further alleged that the note was amply secured and was worth its face value with accrued interest; and that at some time, not stated, "the defendant Salisbury wrongfully and fraudulently transferred or delivered the note and deed of trust

to the defendant Wildeboor;" followed by allegations to the effect that the latter acquired no better title than Salisbury had, and that each of the defendants had wrongfully converted the securities. It may be conceded that the allegations of the complaint were wholly uncertain and ambiguous; but it was sufficient to state a cause of action as against the objections made on behalf of appellants.

2. It is further insisted, for the appellants, that the district court erred in its ultimate findings and judgment against them, as well as in overruling their motion for a new trial; and the argument in that behalf requires a further investigation of the pleadings and proceedings.

The defendants filed an answer to the complaint, which contained six separate alleged defenses. Appellants rely on the first and fourth of those defenses only; and the determination of the question arising on the appeal does not demand special consideration of the rest of the answer. By the first defense, defendants denied each and every allegation of the complaint, "except as herein expressly admitted and stated." The defense did not indicate what was included in the exception from the general denial, and, for that reason, was evasive and insufficient, if attacked by motion or demurrer. The code expressly authorizes "a general or specific denial of each material allegation in the complaint *intended to be controverted* by the defendant." Mills' Ann. Code, sec. 56. It is believed to be correct practice when the defendant does not wish to deny all allegations of the complaint, to admit a part and deny generally the remainder. But when that form of denial is adopted, it should definitely ap-

pear what is admitted, and what is intended to be controverted. It is probable, from an examination of the entire answer, that the exception from the general denial in the first defense was intended to refer to an admission, in the so-called sixth defense of the answer, of the allegations of the complaint respecting the levy upon the note and trust deed by the sheriff of Pueblo county, under execution, and the order of court in the garnishment proceeding, turning them over to the sheriff for sale, etc. To be sure, each separate defense must be regarded as if it stood alone, and should be complete in itself, unless it distinctly and intelligibly refers to what is stated elsewhere in the answer; but, inasmuch as no objection was made to the form of the denial, by motion or demurrer, it may be regarded as putting in issue the material allegations of the complaint.—*Bessemer I. D. Co. v. Woolley*, 32 Colo., 437, 444.

The fourth defense of the answer set forth *in ipso verbis* an "order and judgment," alleged to have been duly given and made on the twenty-first day of December, 1903, in an action then pending in the district court of Pueblo county, "between George Salisbury, plaintiff, and Mary LaFitte, defendant, and Belle Buckley, intervenor, and A. T. Stewart, garnishee." This judgment recited a hearing upon the petition of Belle Buckley, intervenor, "the answer of George Salisbury, plaintiff," as well as the "traverse of Mary LaFitte disclaiming any interest in the matter in controversy," the trial of "the issue in said cause" by a jury, and the verdict of the jury finding "the issues joined in favor of the plaintiff, George Salisbury, and against the intervenor,

Belle Buckley.” Whereupon the Pueblo county district court found that the note therein described (being the same note described in the complaint in the instant case) “was the property of Mary LaFitte at the time of the service of the garnishment process herein on the fourteenth day of August, 1903,” and that the note was in the custody of the clerk of the court. And it was adjudged that said note be turned over to the sheriff of Pueblo county to be sold, “upon a writ of *venditioni exponas* to be issued out of this court, or upon a special order in pursuance of the judgment and decree herein to be prepared by the clerk of this court;” and the application of the proceeds of the sale by the sheriff was directed. The defense further alleged that Mary LaFitte mentioned in said judgment is the plaintiff in the instant action, and that the note and deed of trust mentioned is the property sued for herein; that said Mary LaFitte filed a “traverse” alleging that she was the agent of Belle Buckley in placing the note and deed of trust in the hands of the public trustee, for foreclosure, and Belle Buckley filed a petition of intervention to the same effect; that, on January 25th, 1903, “said note and deed of trust was duly sold by the sheriff of Pueblo county, Colorado, to Susan R. Salisbury, at a public sheriff’s sale,” for \$590, “said Susan R. Salisbury being the highest and best bidder at said sale;” and “that said sale was duly published” in a newspaper mentioned, and the sale was “in strict compliance with the said judgment and according to law;” and that the sheriff “acted fairly and honestly, and without any direction from George Salisbury in the sale of said note and deed of trust to said Susan R. Salisbury.” It

was said at the conclusion of the defense that the judgment was pleaded by the defendants "as a former adjudication of the plaintiff's complaint and the allegations therein contained," etc. Counsel for the appellants do not here insist that the judgment in the garnishment proceedings, as set forth in the fourth defense, was well pleaded as an adjudication of the matters alleged in the complaint in the present action, or, at least, they give no reason why it should be so considered. Certain it is, that the supposed former judgment pleaded, upon its face, adjudicated nothing against the plaintiff in the present action, in contradiction of the claim of right asserted in her complaint. It appears to have been determined by the judgment in question that Belle Buckley was not the owner of the securities, but that the plaintiff in the present action was such owner, at the time of the institution of the garnishment proceedings mentioned, and that the securities mentioned should be sold, upon process for that purpose out of the Pueblo county district court, by the sheriff of the same county. The judgment, as pleaded, was wholly consistent with the allegations of the complaint in this action. The remaining allegations of the fourth defense were either wholly immaterial to the cause of action alleged, or were pure conclusions of law. It is impossible to understand how the allegations of that so-called defense could have constituted a good answer to the complaint. But this is not very important, in view of the subsequent proceedings.

The plaintiff, after a demurrer had been sustained to one replication to defendant's answer, by leave, filed an amended replication, wherein she de-

nied all allegations of new matter contained in the answer. Afterwards a further pleading was filed, by leave, by the defendants, styled a "supplemental answer and cross-complaint." Learned counsel for appellants do not insist that this particular pleading is of importance in the determination of the cause, and we do not find it necessary to comment on it. Thereafter a further so-called "reply" was filed for the plaintiff, and thereupon the defendant filed a motion *for judgment on the pleadings*. Before proceeding with the further complications of this record, the last mentioned "reply" of the plaintiff requires consideration. Omitting averments of purely legal conclusions contained in that pleading, its effect appears to have been as hereinafter stated. After denying "all averments of fact," it was averred that defendant Salisbury "never recovered any judgment" against the plaintiff, and that "no execution ever issued in his favor against her." The materiality of these averments, either to the cause of action asserted in the complaint, or any defense contained in the answer, is not apparent. It will be remembered that the cause of action, as pleaded in the complaint, was based upon the allegations that the securities in controversy had been levied upon by the sheriff of Pueblo county, under garnishee process, upon execution in favor of Salisbury against the plaintiff LaFitte, and by order of court turned over to the sheriff for sale, and that Salisbury prevented the sale under the order the court had entered, and induced the sheriff to turn the securities over to him, Salisbury, and thereupon converted the same to his own use. It was not averred in the complaint, or in the answer of the defendants,

that the latter claimed any right in the note and deed of trust through an execution sale. The only sale mentioned in the pleadings was the one to Susan R. Salisbury, alleged in the fourth defense of the answer, and it was alleged to have been made pursuant to the judgment of the district court of Pueblo county, in a proceeding to which the plaintiff in this case was a party, and therefore not subject to be collaterally attacked by her. So that the above mentioned averments of the so-called reply were irrelevant to the cause of action pleaded, as well as to any supposed defense of the answer. The ninth and tenth paragraphs of this reply averred that the defendant Salisbury "never in fact became the owner by purchase, assignment or otherwise, of the judgment of Henry Rups against the plaintiff, rendered in the district court of Pueblo county, Colorado, on or about December 21st, 1881, for \$2,065, or any judgment of said Rups against her; that said Rups never sold, assigned or disposed of said judgment to said Salisbury or anyone." And it was further alleged that "the alleged and pretended revival of said judgment, January 8th, 1894, was and remains an absolute nullity," for several supposed reasons set forth in the pleading. The last mentioned judgment and alleged revival thereof were not described in the reply except as above stated; and the same had not been mentioned, in any manner, in any prior pleading in the case. The reply did not attempt to connect such judgment and revival with any supposed right of action against the defendants for the conversion of the note and deed of trust, or any defense alleged in the defendants' answer. The purpose of the attack upon what was

designated as the "alleged and pretended revival of said judgment, January 8th, 1894," was left by the pleader wholly to surmise. Besides this, the alleged reasons for attacking the alleged revival of judgment were wholly insufficient for any purpose. The statement that the district court of Pueblo county was without jurisdiction to render the judgment of revival, was a mere conclusion of law, which was not sustained by any allegation of fact, unless it were the further statement in the reply, that "no order to show cause why said judgment should not be revived was ever issued from the court in which said judgment had been rendered, or any other court." This was far from showing that the district court of Pueblo county had not acquired jurisdiction of the person of the defendant, whether by the service of process on her, or by her voluntary appearance, in the proceeding attempted to be assailed by the reply. The presumption is always in favor of the validity of the judicial acts of a court of general jurisdiction, and the burden rests with one, seeking to call in question the jurisdiction of the court in any case, to definitely negative the existence of any fact by which the court might have acquired jurisdiction of the parties affected by its judgment. See *Wilson v. Hawthorne*, 14 Colo., 530; *LaFitte v. Salisbury*, 43 Colo., 248; Freeman on Judgments, secs. 452, 455; *Keely v. East Side Imp. Co.*, 16 Colo. App., 365. Section 243, Mills' Ann. Code, provides that "the defendant may appear and answer the petition in the same manner complaints are required to be answered," etc. The reply of the plaintiff did not attempt to show that she did not so appear and answer a petition for the revival

of the judgment mentioned; and it failed to show want of jurisdiction of the district court of Pueblo county to render the supposed judgment of revival. Without repeating in unnecessary detail the other statements of the reply in supposed impeachment of the alleged judgment of revival, it is enough to say that they amounted to nothing more than an effort to attack the regularity or sufficiency of the proceedings in the district court of Pueblo county, in connection with the revival of judgment, and to suggest defenses against such revival, *e. g.*, the statute of limitations, and want of interest of Salisbury in the judgment revived. It is evident that the alleged judgment of revival could not be collaterally attacked on any of the grounds last mentioned, even if that judgment had been shown by averment to be material to the present action. If judicial precedent were necessary in support of this statement, the authorities will be found to be fully reviewed in *Mortgage Trust Co. v. Redd*, 38 Colo., 458. In the last cited case the court approved the following excerpt taken from *Am. & Eng. Enc. Law* (2nd ed.), vol. 17, p. 1066:

"In doubtful cases, as the safer course, the courts are inclined to treat defects as errors or irregularities rather than jurisdictional defects."

And the opinion approvingly quoted the language of the supreme court of Wisconsin (in *Tollman v. McCarthy*, 111 Wis., 401):

"No order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous

state of the case. The only question in such a case is, had the court or tribunal the power, under any circumstances, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us, it was for the circuit court to determine, in the first instance, when and how the authority with which it was invested to direct a sale, should be exercised; and if, in so doing, it committed error, no matter how egregious, whether in the construction of the statute, or otherwise, still the order was valid until reversed on appeal. It was a mere error or irregularity, which could only be taken advantage of by appeal, but cannot be inquired into in this proceeding."

But the rule of conclusiveness of the judgments of courts of competent jurisdiction, as applied to a judgment of revival, was definitely settled by the opinion of our supreme court in a case between the appellant Salisbury and the appellee LaFitte, apparently involving the same judgment intended to be designated by the veiled and cautious language of the reply.—*LaFitte v. Salisbury, supra*. The point that the pleading, called a reply, was a departure from the complaint, was not made in the trial court, and will be regarded as having been waived. *Kan-naugh v. Quartette Mining Co.*, 16 Colo., 341; *Baldridge v. Leon Lake etc. Co.*, 20 Colo. App., 521. The conclusion, now reached, is that its allegations were immaterial and insufficient in any aspect.

In our opinion, the only material issues presented by the pleadings were those raised by the general denial in the first defense of the answer;

and the burden of proving the allegations of the complaint upon which the liability of the defendants depended, rested with the plaintiff. Without any doubt, the defendants' motion for judgment on the pleadings was ill-chosen; but it did not authorize the rendering of a judgment against them, in accordance with the prayer of the plaintiff's complaint, without proof or confession of facts showing their liability.

3. We quote now from the brief filed by appellants' counsel (who, by the way, did not represent the defendants in the district court):

"When this motion for judgment on the pleadings came on to be heard 'it was stipulated by and between the parties plaintiff and defendant, with the approval of the court, that defendants be allowed to support their motion for judgment on the pleadings by such records as they deemed pertinent, and that the cause be finally submitted thereon for adjudication upon the entire merits, without further trial or hearing, or evidence, and so end and determine the entire controversy and all matters in dispute, touching the note and trust deed mentioned in the complaint.' "

Counsel add: "As we understand it, the action of court and counsel last above referred to, converted the hearing on the motion for judgment on the pleadings into a trial on the merits before the court." It is not easy to understand the precise purport of the stipulation; and the record does not throw much light upon the matter. It appears that upon the hearing had under the stipulation, the *defendants* introduced, as evidence (without objection on the part of the plaintiff), three documentary ex-

hibits. "Exhibit one" was a certified copy of certain proceedings in the district court of Pueblo county, entitled in the case of *George Salisbury, plaintiff, v. Mary LaFitte, defendant*. It contained an order of the district court of Pueblo county, entitled in the case mentioned, granting the motion of the former sheriff of that county for leave to file a substituted return upon the writ of *venditioni exponas* theretofore issued in said cause, "for the purpose of supplying the record, the original writ and return thereon having been lost or destroyed," the order reciting that it appeared to the court that "the return of the said sheriff is in all substantial respects in accordance with the truth." With this order was the motion of the ex-sheriff for leave to make the substituted return, in which he stated that the original return thereon had been lost or destroyed, that the return was the same in substance as the original as to all material matters, and that he accompanied his motion with the amended return "duly verified." The substituted return was attached to what was said in the accompanying affidavits to be a carbon copy of a writ of *venditioni exponas*, issued in the cause, and which was identified with the initials of the clerk of the court. The caption of this purported copy, after stating the venue, stated the title of the cause as follows: "*George Salisbury, plaintiff, v. Mary LaFitte, defendant*." A. T. Stewart, public trustee, garnishee; Belle Buckley, intervenor." It ran in the name of the people, and recited, among other things, the issuing of an execution out of the same court, on August 13th, 1903, on a certain judgment of George Salisbury, plaintiff, against Mary LaFitte, defend-

ant, of date January 8th, 1894, for a mentioned sum and costs, to the sheriff of Pueblo county; the garnishment thereunder of the public trustee of that county, who turned into court, in pursuance of its order, a promissory note and deed of trust (of the same description as set forth in the complaint in the present action); a balance due on an *alias* execution under the judgment recited; and that on December 21st, 1903, judgment was duly entered in said cause in the district court of Pueblo county, in favor of said Salisbury against said LaFitte and said intervenor, adjudging that the said note and trust deed be sold under a writ of *venditioni exponas* in satisfaction of the balance due on the judgment, interest and costs, and accruing costs, besides the sum of forty dollars advanced by the plaintiff to the garnishee. The purported copy concluded with the command to advertise and sell the note and trust deed at public sale for the highest and best price the same would bring in cash in satisfaction of the amount due as the balance of the judgment, besides interest and costs, and the further sum of forty dollars, and to pay to the plaintiff the sums mentioned out of the proceeds of the sale, returning the balance into court; with *teste*, bearing date the fifth day of January, 1904, signed with the initials "L. B. S.," over the words "Clerk of the District Court of Pueblo County, Colorado." The substituted return was signed in the name of the former sheriff, by one calling himself undersheriff, and was verified by the latter, and contained the following statements, in substance: That the person making the return was undersheriff of Pueblo county in the year 1904, and as such received a writ of *venditioni*

exponas in the entitled action, issued out of the office of the clerk of the district court of that county, which writ was duly returned by him to the clerk of said court, with his return thereon, and that the same had since been lost or destroyed, as he was informed; that he was able to make a substituted return, in substance the same as the original return as to all material facts; that attached thereto was a carbon copy of the original writ of *venditioni exponas* issued in said cause, "the figures in which and the initials to which were made by the clerk of said court, Hon. L. B. Straight, as shown by the affidavit of J. C. Elwell, attorney for plaintiff, hereto attached and made a part of this return;" that said undersheriff caused a notice of sale of the note described in the annexed copy of the writ to be published (referring to an attached affidavit of the publisher of a weekly newspaper exhibiting the notice of the sale); that at the time and place specified in the attached notice of sale, the undersheriff offered the note and trust deed at public sale, and struck off and sold the same to Susan R. Salisbury, who was the highest and best bidder therefor, for the sum of \$590 cash, and as sheriff, assigned and delivered the same to said purchaser; there was also attached to the substituted return the receipt to the sheriff of Salisbury, as execution plaintiff, acknowledging full satisfaction of the judgment, with interest and all costs. The foregoing statement contains all of the substituted return, which is deemed material.

The defendants' second exhibit, offered at this hearing, was a certified copy of the verified petition of Marie LaFitte for a writ of *certiorari*, filed in the

supreme court, and the opinion of the court denying the writ, in the matter of *People ex rel. LaFitte, v. The District Court of Pueblo County*, 33 Colo., 257. This exhibit is of great length, and it would be impossible to attempt to epitomize its contents within any reasonable space. It is virtually repudiated, as evidence, by counsel for the appellants, and nothing has been found in it upon which appellee might rely in support of her judgment. The third and last exhibit of the defendants was the opinion of the supreme court in the case of *LaFitte v. Salisbury*, 43 Colo., 248.

Thereupon the plaintiff offered two exhibits, designated respectively as plaintiff's exhibits A and B. Exhibit A purported to be a copy of a motion filed in case No. 6166, in the supreme court, between Marie LaFitte and Susan R. Salisbury, wherein the defendant in error, Susan R. Salisbury, by her attorney, George Salisbury, moved to dismiss the writ of error, besides purported copies of briefs filed in support of and against the motion. Said cause No. 6166 is now cause No. 3844 on the docket of this court, and exhibits one phase of the perennially recurring litigation between appellee and the Salisburys. We have not been favored with a brief on the part of the appellee, and investigation has failed to discover the materiality of this exhibit to the case in hand. Plaintiff's exhibit B consisted of certified copies from the records of the district court of Pueblo county, as follows: (1) *Alias* execution, issued out of the latter court to the sheriff of that county, in the usual form, upon a judgment for the sum of \$3,130 and costs, recovered by George Salisbury, plaintiff, against Mary LaFitte, defendant, on

the eighth day of January, 1894, with what purports to be the return of the sheriff on that writ. The purported return, as it appears in the record, shows no date or signature by the sheriff; and there is no reference therein to the note and deed of trust involved in the present action. (2) Copy of judgment docket of the district court of Pueblo county, containing the following entries, showing a judgment of George Salisbury against Mary LaFitte, of date January 8th, 1894, as follows:

No. 3785. Judgment Docket (Debtor?) LaFitte, Mary; Judgment Creditor, Geo. Salisbury. Time of entry, January 8th, 1894. Revival of judgment in case No. 1628, *Henry Rups v. Mary LaFitte*, \$3,130.00; original costs, \$65.80; costs, \$14.35; execution, 8-13-03, \$1.00. (Also the following receipt of attorney for George Salisbury): November 12, 1903, received on execution issued to Larimer county by sale of real estate bid in by plaintiff, less costs deducted by sheriff of Larimer county, \$5,447.12; also garnishees, \$27.91.

As a result of the hearing, as above stated, and without further evidence, the court gave judgment against both of the defendants for the amount claimed in the plaintiff's complaint. The record does not disclose the slightest evidence tending to connect the defendant Wildeboor with any of the proceedings referred to in the exhibits introduced at the hearing; and it is manifest that the judgment cannot be sustained, as against him. By the rule, which has heretofore prevailed in this state, the judgment, being entire, if reversed for error as to one of the judgment defendants, must be reversed also as to the other. *Gargan v. School District*, 4

Colo., 53, 58; *Streeter v. Marshall etc. Co., Id.*, 535.

But it is not believed that the state of the pleadings and proofs warranted the judgment against Salisbury. It appears from the bill of exceptions that the eminent judge of the trial court based his judgment upon the findings that the original judgment of *Rups v. LaFitte* was barred by the statute of limitations, and that no execution was issued on that judgment; and that the attempted revival of that judgment was "a nullity and void," and that the "issuance of execution upon the same" was "a nullity and void." The principle is willingly conceded that one who puts in motion void process, to the injury of another, will be held responsible for the consequences of his act. However, nothing appears in the record to support a finding that any judgment of the district court of Pueblo county, or proceedings thereunder, so far as shown by proof, was a nullity. The legal presumption was in favor of the validity of those proceedings, when collaterally assailed in another court of co-ordinate jurisdiction, if it can be said that they were so assailed, either by pleading or proof. The substituted return, filed by leave of the district court of Pueblo county, in the case entitled *George Salisbury v. Mary LaFitte*, indicated that the note and trust deed had been sold at sheriff's sale, to a stranger to the present action, under a writ of *venditioni exponas* issued out of that court to the sheriff. It must be presumed, the contrary not appearing, that the latter court was in the due exercise of its lawful powers in ordering the filing of the substituted return to the writ of *venditioni exponas*, upon the motion of the sheriff, who executed the writ. Freeman on

Executions, sec. 358; Crocker on Sheriffs, sec. 43; *Anderson v. Sloan*, 1 Colo., 33; *Golden Paper Co. v. Clark*, 3 Colo., 321; *McClure v. Smith*, 14 Colo., 297. As between the parties to this action, the substituted return, if made by due authority, was conclusive as to the statements therein of the acts of the officer in executing the writ. Freeman on Executions (3rd ed.), secs. 61, 364; *Bishop v. Poundstone*, 11 Colo. App., 73, 75; Crocker on Sheriffs, sec. 44.

But if this substituted return were not evidence at all of the regularity and validity of the sale therein set forth, nevertheless there was nothing in it to indicate that the sale of the note and trust deed was made under a void writ, or was not made at all. It carried with it no evidence that the prior proceedings were void or subject to collateral attack. The supreme court had previously decided (43 Colo., 248) that the judgment in favor of appellant Salisbury against appellee, to enforce which the execution (plaintiff's exhibit B) was issued, could not be avoided, in a direct action instituted for that purpose, for alleged error or irregularity in its rendition, or upon the allegation of alleged defenses, which might or should have prevented the entering thereof, unless it were shown that the judgment debtor was prevented, by the fraud or deception of her adversary, from making her defenses, without fault on her part. If there was any defect in the execution, or the return thereof (plaintiff's exhibit B), of which the plaintiff might have availed herself collaterally, she was precluded from taking advantage of the defect, by the allegations of her

complaint, which have been several times referred to.

Since the judgment of the district court was not authorized by all the pleadings in the case, together with the exhibits produced at the hearing, the judgment must be reversed, and the cause remanded for further proceedings consistent herewith.

Reversed.

[No. 3441.]

WEBSTER V. KAUTZ ET AL.

1. POSSESSION OF LANDS—*Constructive*. Title in fee draws to it constructive possession of the land.
2. DEED OF TRUST—*Appointment of Successor Trustee*. A deed of trust of lands authorizing the creditor to appoint a successor to the trustee, in certain specified cases, a deed of appointment under such power need not recite any reason for the substitution; even if it recites an insufficient reason, a sufficient ground for the appointment may be shown by competent proof.
3. — *Power of Appointment—Construction*. A deed of trust of lands securing a promissory note, provided that "in case of the death, inability, or refusal to act" of the trustee, the legal holder of the note should "have the option of substituting any other person in his stead, by writing acknowledged." Held, that the word "inability" is not to be construed as referring to physical or mental capacity merely. Inability to act, within the meaning of the power, might result from the removal from the state and permanent non-residence of the trustee.
4. QUIETING TITLE—*Plaintiff's Title*. The plaintiff is not required to show an indefeasible title.
5. — *Parties—One Holding Note Secured by Trust Deed*. A decree against the trustee in a deed of trust securing a promissory note does not affect the holder of the note. The trustee is not the representative of the creditor in a litigation extraneous to the subject of the trust.
6. JUDGMENT—*Against One as an Individual*. has no effect upon him in his capacity as trustee in a deed of lands, in the nature of a mortgage.

Appeal from Kit Carson District Court. HON. W. S. MORRIS, Judge.

MESSRS. ALLEN & WEBSTER, for appellant.

MR. P. B. GODSMAN, MR. J. E. ROBINSON, for appellee.

WALLING, Judge.

Appellant was the plaintiff in the district court, in an action brought to quiet title to certain land in Kit Carson county, under chapter twenty-two, Mills' Ann. Code.

The answer of the defendant Disbrow denied plaintiff's allegations of ownership and possession, and alleged that said defendant was the owner and in possession of the land. The answer further alleged that plaintiff's claim was based upon a pretended trustee's deed, wherein T. B. Evans, as trustee, pretended to convey to plaintiff all the right, title and interest which one William W. Carlon had in and to said land, but that at the time of the pretended sale by said pretended trustee, Carlon had no estate, right, title and interest in and to said land, and said pretended trustee's deed did not convey any right, title and interest in and to said land whatever; and that D. Carnahan, who held the title to the land in controversy, and claimed to be the owner, and in actual possession thereof, on or about August 13th, 1904, commenced an action, in the county court of Kit Carson county, to quiet his title against Robert M. Gourlay, Harrington Emerson, trustee, The Reliance Trust Company, and James Beihl, and on the same date filed a notice of suit pending in the office of the county clerk and recorder

of that county; that in that case a decree was duly and regularly entered against the defendants therein, to the effect that said Carnahan was the owner of the land, and said defendants had no interest whatsoever therein, and that said defendants and each of them were forever barred from asserting any claim to the same; and that the plaintiff in this action claims title to the land through and under the defendants in that decree. The answer prayed for a decree quieting the title of the defendant to the land in controversy, and canceling the trustee's deed under which the plaintiff claimed title.

It was adjudged by the court that the defendant Disbrow was the owner and in possession of the land in controversy, and that the plaintiff had no estate or interest therein, etc. On the trial of the cause the following facts were in evidence without dispute. On July 21st, 1890, William W. Carlon was the owner in fee and in possession of the land, and on that date he executed a deed of trust conveying the land to Harrington Emerson, in trust, for the purpose of securing the payment of Carlon's note, for the principal sum of four hundred dollars, to The Reliance Trust Company, due July 1st, 1895. The deed of trust gave to the trustee, or his successor in trust, upon default in the payment of the secured note, power to sell the land, after thirty days' advertisement, and upon such sale to execute and deliver to the purchaser a deed of conveyance in fee of the premises sold; and it was stipulated that the recitals in such deed should be taken and accepted as *prima facie* evidence of the facts therein stated. It was also agreed, by the terms of the deed of trust, that "in case of the

death, inability or refusal to act of the said party of the second part, at any time when action under the foregoing powers and trusts may be required, then the legal holder of said note shall have the option of substituting any other person in his stead, by writing duly acknowledged, and the acts and doings of said party so substituted shall be as effectual and binding as if done by the said party of the second part," including the power to make sale as therein provided. In April or May, 1903, the note, secured by the deed of trust above mentioned, was transferred, with the blank endorsement of the payee, to the appellant, who thereafter continued to be the holder and owner thereof. April 9th, 1906, appellant, as the legal holder of the secured note, executed and acknowledged a writing, which, after referring to the deed of trust and the provisions thereof authorizing the substitution of a trustee, and reciting that "Harrington Emerson has been for many years last past a non-resident of the state of Colorado, and as a result is wholly unable to act in the premises," appointed T. B. Evans as substituted trustee in the place of said Harrington Emerson, "with full power to exercise and perform the powers and trusts created by the said deed of trust, including the sale of the property therein described." May 31st, 1906, T. B. Evans, as substituted trustee, conveyed the land to appellant by a trustee's deed, executed pursuant to a sale made on the last mentioned date. The trustee's deed contained recitals showing compliance with the terms of the power of sale in the deed of trust, reciting, among other things, that "Harrington Emerson is now, and for many years last past has been, a non-resident

of the state of Colorado, and wholly unable to act, and that the legal holder of the note has requested the sale of the hereinafter described lands, and has appointed the undersigned substituted trustee."

August 12th, 1904, D. Carnahan brought an action to quiet his title against the persons named in the answer of Disbrow, as stated above, Carnahan's complaint alleging that he was the owner, and in possession of the land in controversy, and that the defendants therein named made some adverse claim thereto. That action resulted in a default judgment to the effect that said Carnahan was the owner of the land in controversy, and that the defendants in that action had no interest whatever in the premises, and that the defendants and each of them were forever barred from asserting any claim or title thereto. About March 1st, 1905, Carnahan conveyed the land to Disbrow.

The land was, at the time of the commencement of the action, and for twelve years before had been, vacant and unoccupied.

Certain tax deeds, purporting to convey the land in controversy to D. Carnahan, were offered in evidence by the defendant, and were excluded by the court upon the objection of the plaintiff. As appellee has not assigned cross-error, the excluded tax deeds are not before us for any purpose, and are not considered in this opinion. The determination of the controversy, in this court, depends upon the right of the appellant under the trustee's deed, on the one hand, and the defense based on the default judgment in the action brought by D. Carnahan to quiet his title to the land, on the other. The evidence established, *prima facie*, title in the plain-

tiff to the land in controversy, which drew to it the constructive possession. *Phillipi v. Leet*, 19 Colo., 246; *Mitchell v. Titus*, 33 Colo., 385; *Keener v. Wilkinson, Id.*, 445; *Mitchell v. Trowbridge*, 47 Colo., 6; *Hall v. Kellogg*, 16 Mich., 135.

Some objections are raised on the part of the appellee to the technical sufficiency of the proof of plaintiff's title. The title and possession of plaintiff's grantor, at the time of the execution of the deed of trust, having been conceded, and the tax deeds, under which the defendant claimed title having been excluded by the court, it is difficult to understand how the defendant, who had never had either actual or constructive possession, could be heard to question the regularity of the foreclosure proceedings, upon which the deed to the plaintiff rested. The writing appointing the substituted trustee was executed and acknowledged by the holder of the note secured by the deed of trust, and therefore the substitution was made in the manner provided by the latter instrument. It was not necessary that the written appointment should have stated any reason for such substitution; and, even if the writing executed for that purpose had stated an insufficient ground for action by the holder of the note, the existence of a valid ground for making the appointment might, nevertheless, have been shown by competent proof. Such proof was supplied by the recitals of the trustee's deed. It may be said that a non-resident trustee might have been able to execute the power of sale in the deed of trust, in the manner therein prescribed. But, if he was in fact unable to act, at the time when action was required by the holder of the secured note, whether as a re-

sult of permanent non-residence, or otherwise, the latter had the right to designate a substitute trustee for that purpose by pursuing the provisions of the trust instrument. We do not agree with the contention of appellant's counsel that "inability," as used in this trust deed, was intended to refer only to physical or mental incapacity. The trust instrument should be given a reasonable construction, in view of the purposes for which it was executed; and it seems quite clear that inability to act, in a practical sense, when action under the deed of trust was required, may have resulted from the permanent non-residence of the trustee. Besides, the trustee's deed recited, in addition to the fact that the trustee was, and for many years had been, a non-resident of the state, that he was unable to act, which fulfilled the condition of appointing a substitute. The recitals of the trustee's deed, in connection with the other evidence, were sufficient, *prima facie*, to show compliance with the terms of the deed of trust in the sale and conveyance to the plaintiff, as against the defendant, and in this form of action. Under the circumstances disclosed by this record, the plaintiff was not required to show a perfect and infeasible title, and it does not appear that the defendant had any possible interest in the objections urged against the sufficiency of the plaintiff's proof. See authorities *supra*; *Perkins v. Morse*, 30 Minn., 11; *Glos v. Randolph*, 138 Ill., 262; *White v. McSorley*, 47 Wash., 18, 20; *Graton v. Holliday etc. Co.*, 189 Mo., 322.

There remains to be considered the claim of title by estoppel, based upon the judgment of the county court, in the action brought by defendant's

grantor, Carnahan, in August, 1904, to quiet title to the same land. The evidence in support of that supposed defense consisted of a certified copy of the judgment roll, consisting of the complaint, summons and return not found as to all defendants, proceedings for service by publication, and the default decree, the substance of which has already been stated.

It is elementary that a judgment *in personam*, given by default, is binding as an adjudication only upon the parties to the action, in which the judgment was rendered, and their privies. *Lower Latham D. Co. v. Loudon I. C. Co.*, 27 Colo., 267; Freeman on Judgments (4th ed.), secs. 252, 464. The note secured by the deed of trust having been assigned to the appellant, prior to the commencement of Carnahan's action, appellant is not concluded by the judgment in that action by reason of privity with the original holder of the note. 1 Freeman on Judgments, sec. 162; *Powers v. Heath's Administrator*, 20 Mo., 319; *Gottlieb v. Thatcher*, 34 Fed., 435, S. C. 151, U. S. 271.

The judgment in favor of Carnahan against Harrington Emerson—assuming that it was valid upon the face of the record thereof, which is not decided—did not conclude the appellant, for at least two reasons. In the first place, the former action was not brought against Emerson, by any description or allegation in the complaint in that action, in the capacity of trustee under the Carlon deed of trust. Hence the default judgment bound him, if at all, in his individual capacity only. See *Greig v. Clement*, 20 Colo., 167. Further than this, such a judgment, if rendered against a trustee, to whom

the naked legal title to land had been conveyed solely to secure a debt evidenced by the promissory note of the trustor, in an action to which the holder of the note was not a party, could not affect any right of the latter. Such a trust is not of the nature which can make the trustee the representative of the secured creditor in litigation extraneous to the subject of the trust.

"The general equity rule is, that all persons interested in the subject matter of a suit must be made parties in order that the decree may affect their rights, and this rule requires that in litigation had in respect to trust property, both the trustee and the *cestui que trust* be made parties. There is an exception to this where the trust is an active one, imposing on the trustee the duty of receiving, controlling and managing the trust fund for the benefit of the *cestui que trust*. * * * But where a trustee is interposed between a lender and a borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred upon him by a mortgage or a deed of trust, and the trustee can only be called upon to act in case of default of the grantor in performing the conditions of the instrument, both trustee and *cestui que trust* must be made parties." *McGraw v. Bayard*, 96 Ill., 146; *Collins v. Lofftus*, 34 Am. Dec., 719, and see note at page 722; *Clemons v. Elder*, 9 Ia., 273; *Reed v. Reed*, 16 N. J. Eq., 248; 1 Freeman on Judgments (4th ed.), sec. 173, note 3, page 316.

Before the defendant could avail himself of the judgment relied on as an estoppel against the plaintiff, it was incumbent upon the former to show by

pleading and proof that the latter was bound thereby; and in this respect the case of the defendant wholly failed. 1 Freeman on Judgments (4th ed.), secs. 154, 252; 2 Id., sec. 460.

Since the defendant Disbrow was wholly without title to the land in controversy, upon this record, there is nothing to support the judgment rendered in his favor. The judgment against the appellant in favor of appellee Disbrow, is therefore reversed, and the cause will be remanded for a new trial as between them. *Reversed.*

[No. 3462.]

ROBERTS ET AL. V. SCURVIN DITCH CO.

EMINENT DOMAIN—*Value of Lands Taken—How Estimated.* The value of lands taken under the statute of eminent domain is to be estimated not merely with reference to the use to which it is at the time applied, but with reference to uses to which it is plainly adapted. The owner of lands having thereon an excavation for an irrigating ditch, never used for the purpose, and long since abandoned by the person who made it, is entitled to the market value of the land, taking into account this excavation considered with the reference to the purpose for which it is suited.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. J. F. FARRAR, for appellants.

Mr. PAUL W. LEE, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

This is an appeal from the judgment of the district court in a condemnation proceeding involving the right of way for an irrigation ditch.

The judgment appealed from after reciting the amount of damages to be allowed the appellants, by the commissioners theretofore appointed, to-wit: \$175.00, as having been regularly and properly ascertained and determined and having been theretofore paid into court for the use of appellants, rendered judgment as follows:

"Now, therefore, it is ordered that the said petitioner shall be and become seized in fee of the following described land, and that it may take possession of and hold and use the same for the purpose specified in said petition, and that it shall thereupon be discharged from all claims for any damages by reason of any matter specified in such petition and certificate of commissioners, that is to say: A strip of land extending through the northwest quarter ($nw\frac{1}{4}$) of section 26 and through sections 23 and 13, all in township 10 north, range 70 west of the 6th P. M. in Larimer county, Colorado, the same being one hundred (100) feet in width; fifty (50) feet on either side of the center line of a certain ditch now constructed thereon, which line is described as follows: Commencing at a point on the canal of the North Poudre Irrigation Company whence the southeast corner of section 22, township 10 north, range 70 west of the 6th P. M., bears north 61 degrees, 21 minutes east 1190 feet; thence in a general northeasterly direction to a point 1812 feet east of the quarter corner on the west side of section 13, township 10 north, range 70 west of the 6th P. M., at which point the said constructed ditch terminates; and also continuing from the said last mentioned point, a strip of land one hundred (100) feet in width, being fifty (50) feet on either side of a line

described as follows: From the end of said ditch above described, thence north 9 degrees, east 545 feet, thence north 32 degrees, east 300 feet to a natural ravine or gulch following the center line or thread of said ravine in a northeasterly course 3884 feet to a point on the east line of section 13, township 10 north, range 70 west, 378 feet south of the northeast corner of said section 13; the said land so to be taken being 38.36 acres."

It further appears that the condemnation proceeding was instituted in compliance with the direction of the court, in a judgment before rendered in an injunction proceeding, wherein the appellants sought to enjoin the appellee from entering upon and using said lands and a certain ditch or excavation, the land in question, alleged to be the property of the plaintiff.

The findings and judgment of the court in that proceeding were as follows:

"And the court having heard the evidence adduced by the plaintiffs and the defendant as well, touching the allegations contained in the complaint and answer and being now fully advised in the premises doth find: That the equities herein are with the plaintiffs; that the allegations in the complaint contained are true; that the work of the construction of the Scurvin ditch was begun about the year 1885 and that the same was never completed, but that the same was abandoned by the original projectors of the said ditch, more than twenty years prior to the commencement of this action; that no easement was obtained by the original builders of said ditch through, over and across the land now owned by the plaintiffs; that neither the North

Poudre Land, Canal and Reservoir Company, or its successors in interest have done any work on the said ditch from the date of the cessation of work thereon in the year 1887, until the defendant entered thereon in May, 1908, to repair and complete the said ditch.

That the defendant herein obtained no right to possession of the said ditch, or right of way by virtue of its deed, dated April 8, 1908, from the North Poudre Irrigation Company, successor to the North Poudre Land, Canal and Reservoir Company, the original builder of said Scurvin ditch; and the said defendant, The Scurvin Ditch Company, should be enjoined during the pendency of this action and until the final hearing herein, from further occupancy or possession of the said ditch and right of way, as the same traverses the lands of the plaintiffs as herein above mentioned, and:

THEREFORE, It is ordered, adjudged and decreed, that the defendant, herein The Scurvin Ditch Company, forthwith refrain from further occupying the line of ditch commonly known as The Scurvin ditch, as the same traverses sections 13, 23 and the northwest quarter (nw¼) of section 26, township 10 north, range 70 west; unless forthwith the said defendant shall elect to file its petition in condemnation to condemn a right of way for said ditch, as the same traverses the aforesaid lands; and thereupon the Scurvin Ditch Company files in this court its petition in eminent domain, being No. 2313 of the files of this court to acquire the said right of way, to have adjudged the compensation therefor and the damages to be assessed in the manner provided by law, and in said proceeding this day obtains its

order for temporary possession of the said right of way upon making the deposit in the registry of this court, as by the order in said case provided; and thereupon it appearing to the court that the matters in litigation between the parties hereto in the pending cause have been fully adjudicated and determined and nothing further remains to be done in this action;

Therefore, It is ordered that the said action be dismissed at the cost of the defendant."

There was no appeal from this judgment; the condemnation proceeding was then instituted, and commissioners duly appointed who made report with the following findings:

"That the value of the land of the respondents actually taken is \$115.00 (one hundred fifteen dollars).

That the damage to the residue of the land of the respondent is \$160.00 (one hundred sixty dollars).

That the amount in value of the benefits to respondent is \$100.00 (one hundred dollars).

In making the above award we have not considered the value of the ditch excavation heretofore constructed upon said land."

Thereupon the appellants filed their verified motion to set aside and vacate the report and findings of the commissioners, and in addition to the facts heretofore set forth, alleged:

"That the respondents herein are the owners and in occupancy of section twenty-three (23), the northwest quarter (nw $\frac{1}{4}$) of section twenty-six (26), and section thirteen (13) in township ten (10)

north of range seventy (70) west, Larimer county, Colorado.

That in the years 1885, 1886 and 1887 there was partially constructed across the lands above mentioned by one Scurvin, a ditch excavation, said Scurvin being a contractor as respondents are informed and believe, of one F. L. Carter Cotton. That the work of said ditch was abandoned by the said Carter Cotton and the said Scurvin, more than twenty years ago, and that said work remained in said abandoned state and condition, unused by any persons whatsoever, until after respondents herein acquired title to said land, and until the winter of 1906 and 1907 when said respondents worked upon said ditch and enhanced its value with the expectancy and intention of using said ditch for the carriage of water."

That "in due course the said commission proceeded to take and hear testimony as to the value of the land and the compensation which was proper to be allowed the said Roberts Brothers, and at said hearing the said respondents offered evidence tending to show that the said ditch excavation hereinbefore referred to, the same being the property of the said Roberts Brothers, had originally cost to construct, a large amount of money, to-wit, about \$10,000.00. That the same had a reasonable market value of a large sum of money, about \$3,000.00. That the said Roberts Brothers had done work heretofore toward completing and repairing said excavation, expecting and intending to use it for irrigation purposes, and that said excavation would be a saving to the said Scurvin Ditch Company of approximately ten thousand dollars (\$10,000.00). Testimony was

further introduced and it was admitted by the officers of the Scurvin Ditch Company that the work of building and constructing the ditch across said lands would not have been undertaken by them, had they not expected to utilize said excavation and receive the benefit of said excavation, and save the cost of construction thereof and that the Scurvin Ditch Company had undertaken its irrigation project under the belief that they were the owners of said excavation." And further, that:

"Respondents would further show that at said hearing Paul W. Lee, Esquire, attorney of record and appearing at said hearing for the Scurvin Ditch Company and L. C. Moore, the president of said Scurvin Ditch Company, over the objection of counsel for the respondents herein, stated to the members of this commission that this honorable court had, upon a hearing upon the application for the injunction in the case of The Roberts Brothers against The Scurvin Ditch Company, as hereinbefore referred to, ruled that the said Roberts Brothers were not entitled to any compensation by reason of the fact that there existed an excavation across said lands as above mentioned, and respondents would further show that in computing the amount of damage to be allowed the said respondents and the compensation to be awarded them for a right of way across said lands, the said commission did not consider the value of the ditch excavation hereinbefore referred to, as appears from their report on file herein."

The record does not show that there was any denial or reply filed to this verified motion, or that any testimony was taken concerning the same. So

that it appears here simply upon objection to action of the court in denying the motion to set aside the findings and award of the commission, and the rendition of the judgment thereon.

It will be seen that from the judgment in the injunction case which became final, the appellants were the owners in fee of the premises, and that the appellees at that time had no right therein, nor any easement thereover or thereon. It also appears from the verified motion to set aside the appraisal and award, that at the time of all the court proceedings above, that there was upon the premises so to be condemned a ditch excavation which originally cost to construct about \$10,000.00 and which was of the reasonable market value of \$3,000.00, and which might be, and was intended to be, used by the appellants for an irrigation ditch to be constructed by themselves.

That this excavation was not taken into consideration by the commissioners, appears clear from the report which expressly recites:

“In making the above award we have not considered the value of the ditch excavation heretofore constructed upon said land.”

It seems from the statements of counsel on both sides that the lands in question were owned by the Union Pacific Railroad Company, and that one F. L. Carter Cotton secured a contract of purchase, and while so holding organized an irrigation company which proceeded to make the excavation in question; that the land was afterward forfeited to the railroad company, and that the ditch was abandoned about twenty years before the injunction suit,

and at which time appellants were the owners of the property in fee.

Just when, or from whom, or how appellants acquired title does not appear.

The situation is then, that appellants were the owners of a certain tract of land upon which there was a ditch excavation, useful for the purposes designed by appellee, and to be used by them, and to which they were awarded by the decree and easement, but a ditch which had been constructed at a large cost, prior to the securing of title by appellants.

Then under these circumstances were the appellants entitled to have the value of this excavation considered by the commissioners in their finding and award, from which this is an appeal.

The circumstances are so varied as to make it difficult to lay down any fixed rule applicable in all cases as to the method of determining the value by appraisalment of property to be condemned for public use.

The general rule in this regard as stated by Mr. Justice Field in the case of *Boom Co. v. Patterson*, 98 U. S., 403, seems to be generally accepted, as follows:

“The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others

may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

This was a case where the land owner had three islands in the Mississippi river, specially fitted and located to from a boom for holding logs.

The proceeding for condemnation arose in the state courts and after the commission appointed, had made the award, was transferred to the United States court. The award by the commissioners was \$3,000.00 from which appeal was taken. The jury in the federal court allowed \$300.00 for the land used and \$9,058.33 for its value for boom purposes. The court refused a new trial upon condition that the judgment be reduced to \$5,500.00 and this judgment was affirmed in the case cited. The court said:

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." *Boom Co. v. Patterson*, 98 U. S., 403.

Colusa County v. Hudson, 85 Cal., 633, was a case where the land condemned was to be used as a

public road and the court uses an illustration which in principle seems to apply here as follows:

"If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use, without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something, and is no doubt of some value. The county proposes to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the benefit, and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition."

In the case of *Railway Co. v. Murphine*, 4 Wash., 448, it was urged that the trial court erred in permitting testimony to show the value of the land for the growing of hops, in that hops had never been grown on the land, although it was shown that the land was adapted to such crop. The court held this not to be error and said:

"The market value of property is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner." Lewis on Em. Domain, 478.

In a proceeding to condemn land for the pur-

pose of a reservoir, it was held in *San Diego Land Co. v. Neale*, 78 Cal., 63, that evidence of the value of the land as a reservoir site was admissible although it had never been used for such purpose. This case cites many cases in support of the court's conclusion, and which tend to sustain the contention of appellants in this case.

In *Railway Co. v. Canal Co.*, 34 Hun., 116, a proceeding to condemn a tract of land for canal purposes, the court said:

"The strip of land was practicable and desirable for the route of a railroad. The respondent was holding it for use or for sale for that purpose. The petitioner, in the construction of its railroad, wanted this property. It became simply a question of its value for the use and purpose for which it was owned and held by respondent, and wanted by petitioner. If an unimproved water-power would be destroyed by the location of a railroad, ought not the owner to be compensated therefor? No doubt can exist. The damages would be, not the value of the use to the owner in its unimproved condition, but the market value of the property of water-power, having reference to the use which could reasonably be made of it. The rule should be the same in the present case. Here was a narrow strip of land formerly used as a way and only of value for a way. The owner holds it for such purpose only, expecting the time will presently come when he can utilize it to his own profit or sell it to some one else for such purpose. Why then are not the purposes for which it is held and the uses to which it is adapted, proper elements in its value? We think they are, and that the commissioners did not err in assessing compensa-

tion upon the basis of its value for railroad purposes."

So in this case the appellants were holding the land with the constructed ditch, suitable, and constructed for irrigation purposes and intended to be used for such purpose by them. The above citation is precisely in point.

This doctrine is sustained in *Colorado Midland Ry. Co. v. Brown*, 15 Colo., 193, wherein the appellee was permitted to show the market value of the water-power, and its adaptibility to the operation of mining machinery, and electric motors in and about the city of Aspen, though not so used at the time.

The court in that case laid down the rule for recovery in such cases as follows:

"Compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisalment.

Damages to the residue of the land or property not taken, equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put; and in determining such damages the use to which the property taken is subjected, and the loss and inconvenience thereby occasioned, may be taken into consideration, as the construction and operation of a railroad. Eminent Domain Act (approved Feb. 12, 1877), sec. 17; *City of Denver v. Bayer*, 7 Colo., 113; *Railroad Co. v. Allen*, 13 Colo., 229; Lewis Em. Dom., secs. 478, 487; *Railway Co. v. Vance*, 115 Pa. St., 331; *Johnson v. Railway Co.*, 111 Ill., 413; *Weyer v. Railroad Co.*, 68 Wis., 180." See also *Ry. Co. v. Griffith*, 17 Colo., 599.

The appellee cites a line of authorities holding

that where a corporation vested with the power of eminent domain enters upon lands and places improvements thereon, such as pipe lines, railroad tracks, etc., that these do not become a part of the realty and may be removed, or that in case of, after condemnation by such corporation, the land owner is not entitled to the value of these as a part of his compensation.

This is another and different rule and can not apply in this case.

In the first place the ditch is simply an improvement in the matter of change in the form and location of the soil itself, and, secondly, it was judicially determined, before the condemnation proceeding was instituted:

“(a) That no easement was obtained by the original builders of the ditch over and across the lands now owned by the Roberts Brothers.

(b) That neither the original projector nor its successor in interest did any work on said ditch from the date of cessation of work in 1887 until The Scurvin Ditch Company entered thereon in May, 1908.

(c) That The Scurvin Ditch Company obtained no right to possession of said ditch or to the right of way by virtue of its deed, dated April 8, 1908, from The North Poudre Irrigation Company, the successors of the original projector.”

The appellee therefore stood in the same relation to the land as would any other corporation vested with the right of eminent domain in a proceeding to obtain the right of way for a public purpose, and must be held to pay the market value of the lands taken for the purpose for which it was

suited, whether used for such purpose at the time or not.

Judgment reversed, with instruction to sustain the motion to set aside the commissioners report, and proceed in accordance with the views herein expressed.

All the judges concurring.

Decided April 8, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3495.]

WARD V. ATKINSON, Executor.

1. *CONTINUANCE—Affidavit.* An affidavit to support an application for the continuance of a cause on account of the absence of a witness should ordinarily be made by the party himself rather than by his attorney. If the party himself is unable to make the affidavit, the reason of his inability should be made to appear. The affidavit must show the whereabouts of the witness, to what he would testify if present, and due diligence to procure his attendance or his deposition. If to excuse the failure to secure his deposition a letter of the witness promising to attend is relied upon, the letter should be presented.
2. — *Length of Continuance Applied for.* It seems that under certain conditions, e. g., where the cause had been tried in the county court, and appealed to the district court, the length of time for which delay was requested may enter into the question of whether there was error in denying the application.
3. — *Prior Application—Stipulation to Admit Testimony.* A trial and verdict for the opposite party, in the county court, after a similar application upon the same ground, showing the testimony expected of the witness, and met by a stipulation that the witness would so testify if present, is ground to deny the application, when renewed upon appeal to the district court, no attempt to secure the deposition of the witness in the meantime appearing.
4. *BILL OF EXCEPTIONS—When Necessary.* Error alleged upon instructions given will not be considered where no exception thereto was saved.

5. INSTRUCTIONS—*Objections and Exceptions to.* An exception to the whole of an instruction, no attempt being made to call the attention of the court to the only clause or phrase complained of—the instruction being of considerable length—is inapt, and will not entitle the defeated party to a review of the instruction.

6. EVIDENCE—*Uncontradicted Testimony of a Party.* It is not the law that the unsupported testimony of a party to the action is sufficient as a matter of law to establish any fact, even though such testimony be uncontradicted. The jury are not under an absolute duty to accept such testimony as true.

7. NEW TRIAL—*Newly Discovered Evidence—Affidavit.* Motions for a new trial grounded upon newly discovered evidence are not regarded with favor. The denial of such a motion by the trial court will not be disturbed save in case of gross abuse of discretion.

Where the application is grounded upon the alleged discovery, since the trial, of the whereabouts of an absent witness, the affidavit must by a statement of the facts show what efforts the party made before the trial to ascertain the whereabouts of such witness. A mere averment of "all possible diligence" will not suffice. And where it is manifest by the record that long prior to the trial the applicant knew of the materiality of the testimony of the witness, and knew of his whereabouts, the application should be denied.

The affidavit of the absent witness as to the facts to which he will testify should be produced, or the failure to procure it excused.

Appeal from El Paso District Court. HON. JOHN W. SHEAFOR, Judge.

Mr. W. D. LOMBARD and Mr. ROSCOE P. ADDY,
for appellant.

Mr. HENRY TROWBRIDGE and Mr. O. E. COLLINS,
for appellee.

CUNNINGHAM, Judge.

Appellee, as plaintiff below, brought her action in the county court in replevin, to obtain possession of a certain automobile which she alleged defendant wrongfully withheld from her. The sole issue in the

case was as to the ownership of the car. There is no dispute but that plaintiff purchased the car from one Marlow, and that she thereafter left the same in his possession. Defendant claims to have later purchased the machine from Marlow, and taken possession of it, and on the trial sought to prove that plaintiff had intrusted the machine to Marlow with authority to sell and dispose of the same. Plaintiff's evidence tended to show that she had intrusted the car temporarily to Marlow, who ran a garage, while she was absent from the city, but without giving him any authority to dispose of it. The evidence shows that defendant took possession of the machine on or about March 28th, 1907, and under a redelivery bond, held possession of it until December 23rd, 1908, the date of the second trial, which was in the district court. Two juries, one in the county and one in the district court, have found in favor of plaintiff, and motions for new trials in each instance have been denied by different judges. The errors argued in the briefs pertain to (a) the refusal of the trial court to grant a continuance (b) the giving of certain instructions (c) in refusing to grant the motion for a new trial, based largely on newly discovered evidence.

1. Five days before the case was called for trial one of defendant's attorneys filed an affidavit made by himself, supporting his motion for a continuance. This affidavit was deficient in the following particulars. (1) it failed to set up what the absent witness would swear to, if present.

Cody v. Butterfield, 1 Colo., 377; *Chase v. People*, 2 Colo., 509; *Glen v. Brush*, 3 Colo., 26.

(2) The affidavit failed to disclose the where-

abouts of the witness, and omitted the message or letter which the affiant states that one of the absent witnesses had sent or written, stating that he would be present.

Furthermore, it appears from the record that the defendant had known the whereabouts of the witness for three months or more, and on account of his absence made a similar application for a continuance when the case was tried in the county court, but in that application, that is, the one made to the county court, what was expected to be proven by the witness was set forth, and the plaintiff stipulated that if the witness was present, he would swear to the state of facts to which, by the showing made, it was stated he would testify, and the case went to trial, with the result that verdict and judgment went against defendant in the county court.

(3) No attempt appears to have been made to take the deposition of this absent witness, and no request was made of the trial court for a short continuance for the purpose of taking his deposition. Neither does the affidavit show due or any diligence to procure the presence of the witness at the trial, as required by sec. 194 of the code (R. S.)

The affidavit in support of a motion for a continuance should ordinarily be made by the applicant, rather than his attorney, and where the applicant cannot, for some reason, make the affidavit himself, the reasons of his inability should be made to appear. 4 Enc. Pl. & Pr., 875; 9 Cyc., 135. For the reason stated, the trial court committed no error in denying the motion for a continuance.

2. No instructions were tendered by appellant, hence if the instructions as given by the trial court

were insufficient, which we do not intimate, it amounted, at most, to non-direction, and this feature need not be considered by us.

Error is assigned on the giving of instructions 2, 3, 5, 6, 7 and 7½. We find no objections or exceptions whatever to any instruction in the abstract of record, and no objection whatever appears to have been interposed or saved as to instructions 7 and 7½. We might, with propriety, decline to consider all assignments of error based on the instructions, for the reasons pointed out, and we must so decline as to instructions 7 and 7½, to which no attempt whatever was made to save exceptions. The rules governing the preparation of abstracts are accessible to all practitioners, and have been in existence for a great many years, and almost every one of our seventy volumes of reported cases contain suggestions and admonitions concerning this matter, and the proper practice as to making objections and saving exceptions. It would seem that by a little care, attorneys ought to find no difficulty in following these rules and the suggestions so often made by our courts of review, at least substantially.

We perceive no error in the instructions, but since one complaint with reference to them is vigorously debated, and many authorities are cited by appellant to support his contention, we shall consider it. It is urged that the trial court, in various instructions, intimated or insinuated that whether the defendant purchased the automobile from Marlow or his company was a question for the jury to determine. The only testimony offered on this point was that of the defendant himself. He testified positively and unequivocally that he purchased the ma-

chine of Marlow, on a date subsequent to its sale by Marlow to plaintiff, and while it was in Marlow's possession, and while the plaintiff was out of the city. Appellant asserts that since no testimony was offered in contradiction of defendant's testimony on the point that he had so purchased the machine, it was error to submit that question to the jury. There are several answers that might be made to this contention. For instance, the phrases in the instruction, of which complaint is made in the brief, were not specifically objected to. The exception was taken, in each instance (where any exception was taken at all), to the entire instruction, no attempt being made to call the court's attention to the objectionable phrase. To illustrate: Instruction 2 is somewhat lengthy. It properly advised the jury as to the burden of proof that rested upon the plaintiff, and no fault was found with this instruction by defendant, except that it contained a parenthetical phrase reading: "If you find he did purchase it." (In this phrase the pronoun "he" refers to the appellant, and the pronoun "it" refers to the machine.) Instruction No. 2 contained three paragraphs. The phrase objected to is found in the second of these three distinct paragraphs, which together compose instruction No. 2. Defendant's objection was general, and went to the whole instruction, and does not appear in the abstract at all, but in an unabridged portion of the bill of exceptions, rather than in the record. As to the proper manner of making objections to instructions, and as to the duty of both counsel, and the trial court, on the trial below, with reference thereto, see *Portland M. Co. v. O'Hara*, 45 Colo., 416; *City of Denver v. Hyatt*,

28 Colo., 129. But we prefer to dispose of the objection raised on its merits, and to base our ruling upon authority and reason, rather than upon the insufficiency of the record.

Whatever the rule may have been, at a time when interest absolutely disqualified a witness, as to the weight and sufficiency of the testimony of a single witness, it is not now the rule that the unsupported, though uncontradicted, testimony of a party to a contested suit is sufficient, as a matter of law, to establish the fact concerning which he testifies. So in this case, it was not only not error for the learned trial judge to submit the question of defendant's purchase of the car to the jury for its determination, but he discharged his plain duty by so doing. We believe the authorities, a few of which will be cited later, are in substantial accord on this question. In the present case (as indeed in substantially all jury cases generally) the jury was instructed as follows:

"You are the sole judges of the weight and sufficiency of the testimony, and the credibility of the witnesses who have testified; and in passing upon this question, you may determine, and have the right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly. You may also take into consideration the interest, if any, which any witness may have in the result of this trial, and if you believe from the evidence that any witness has wilfully and cor-

ruptly sworn falsely to any material fact in the case, then you are at liberty to disregard the entire testimony of such witness, except in so far as the same may be corroborated by some credible testimony, or in so far as the facts and circumstances are proven on this trial."

No objection was made by appellant to this instruction, and we apprehend that it will not be contended that it does not correctly state the law. If appellant's contention that when the defendant has spoken, his testimony binds court and jury until some evidence in conflict therewith is produced is sound, then the stock instruction which we have just quoted in part must be qualified so as to read:

"You are the sole judges of the weight and sufficiency of the testimony and the credibility of the witnesses who have testified (except the plaintiff or the defendant), and in passing on this case you may determine, and have the right to determine, from the appearance of the witnesses on the stand * * * which witnesses are the more worthy of credit, and to give credit accordingly (except as to the plaintiff or the defendant). You may also take into consideration the interest, if any, which any witness may have in the result of this trial (except as to the interest of the plaintiff or of defendant). And if you believe from the evidence that any witness (except the plaintiff or the defendant) has wilfully and corruptly sworn falsely to any material fact in the case, then you are at liberty to disregard the entire testimony of such witness. When, however, the defendant (as in this case) shall testify in his own behalf, his testimony is absolutely binding upon you, and you must accept as true what-

ever he has testified to, unless and until evidence in contradiction thereof is produced."

It ought to require no authority to support our conclusion as already announced, viz., that the testimony of a party to a suit, upon an issue raised by the pleadings, does not, as a matter of law, establish the truth, and take from the jury the right and the duty to determine the issue concerning which he testifies, even though no evidence in contradiction thereof be produced on the trial. But we cite in support of our conclusions the following cases:

Turner v. Grobe, 24 Tex. Civ. App., 554; *Coats v. Elliott*, 23 Tex., 606; *Monoz v. Wilson*, 111 N. Y., 295; *Bonnentheil v. Brewing Co.*, 172 U. S., 401; *Elwood v. W. U. Co.*, 45 N. Y., 549; *Huff v. Cox*, 2 Ala., 310; *Rhodes v. Lowery*, 54 Ala., 4; *Starr v. Fuller et al.*, 71 Ia., 425; *Bank v. Wallach*, 45 N. Y. Sup., 885; Thompson on Trials, sec. 2287.

Mr. Thompson says:

"But where the plaintiff makes out a case by undisputed testimony, it is not error to instruct the jury that *if they believe such testimony*, to find for the plaintiff, and to point out to them that the defendant has seen fit to offer no contravailing testimony. But under any theory of the relative provinces of court and jury, where there are questions of fact for the determination of the jury, it is error, even in those jurisdictions where the court is allowed to sum up the evidence, to give a charge which virtually decides the questions of fact, and withdraws them from the consideration of the jury."

3. In support of his motion for a new trial, defendant filed his own affidavit, and that of his counsel, the affidavits being offered for the purpose

of showing newly discovered evidence. The evidence which was claimed to have been discovered since the trial was that of Marlow, who sold the machine to the plaintiff, and who the defendant claims sold the machine, later, to himself, by the authority or direction of the plaintiff. While the defendant, in his affidavit in support of his motion for a new trial, states that he had "used all possible diligence to discover the whereabouts and the present location of the said Marlow, and to discover evidence of the facts hereinabove set forth, and that defendant's efforts therein were vain," still he makes no attempt to enlighten the court as to what efforts he had made to locate Marlow. In this affidavit defendant states that Marlow was located at No. 256 Broadway street, in the city of New York. In the affidavit filed for a continuance, five days prior to the trial, and to which reference has been heretofore made, counsel for defendant states "that the testimony of one witness, to-wit, W. D. Marlow, is especially material to establish the rights of the defendant, for the reason that he was the party who had the original transaction with the plaintiff in this action in regard to the automobile in controversy in this action." It, therefore, appears that the materiality of Marlow's testimony was known to the defendant prior to the trial. Indeed, the record discloses that he had known of its materiality prior to the first trial, in the county court. This fact is made to appear by affidavits of the county judge and the official stenographer in the county court, filed by appellee in resistance of the application for a new trial in this case. By the uncontradicted affidavits of the county judge and the

official stenographer, it is also made to appear that defendant knew that Marlow, at the time of the trial in the county court, was in New York city, and by testimony given in the county court it is apparent that the defendant had known what his street address was. While on the stand in the county court the defendant testified that Marlow's street address was "some street address in New York city, but I do not remember the number," which fairly shows that he had known, but at the moment, while on the stand, he had forgotten the street number. It seems clear, therefore, that the defendant must have known both of the materiality of Marlow's testimony, and his address, long before the trial in the district court, and there is no showing of any attempt whatever, as has been said, to take his deposition, and no affidavit whatever of Marlow's filed to show what he would testify to. All the information we have as to whether his testimony could be had at another trial, or what he would testify to, are the statements made by the defendant. The affidavits of the absent witnesses as to what they would swear to in the event a new trial should be granted, ought to be presented, or valid excuse for the failure to present them given. In the very nature of things, the defendant could not state what the attitude of an absent witness might be on a new trial, or what he would say when once he is subjected to examination under oath. The most that counsel or defendant, who made the affidavits in this case, could know, is what the absent witness wrote or told them he would swear to, and it is not stated in the affidavits how they obtained the information as to what he would testify to.

Thompson on Trials, vol. 2, sec. 2762; Enc. Pl. & Pr., vol. 14, p. 825; Elliott's Appl. Proc., sec. 857; *Rogers v. Huie*, 1 Calif., 429; Spelling's New Tr. & Ap., p. 528; Hayne on New Tr. & Ap. 261, sec. 93; *Jenny Lind Co. v. Bower*, 11 Calif., 191.

In the latter case Mr. Justice Field said:

"The affidavit of Marshall as to the testimony which Hoffman would give, should have been accompanied by Hoffman's affidavit. Hoffman's absence at his residence at Forest Hill, and the consequent inability of Marshall to obtain his affidavit in time, was not a sufficient excuse for its non-production. If necessary, application should have been made for additional time to obtain and file it."

The care required in the preparation of motions for new trials, and the affidavits in support thereof, is pointed out in the following Colorado cases:

Outcalt v. Johnson, 9 Colo. App., 519; *Barton v. Laus*, 4 Colo. App., 212; *C. S. & I. Ry. Co. v. Fogle-song*, 42 Colo., 341; *Cole v. Thornberg*, 4 Colo. App., 95.

Motions for new trial based upon newly discovered evidence are ordinarily not favorably regarded, and their disposition usually is left to the discretion of the trial judge, whose action in denying such motions will not be reversed, except for gross abuse of discretion.

Baylies New Tr. & Ap., 527-9; Spelling's New Tr. & Ap. Proc., vol. 1, secs. 206-9-21; Enc. Pl. & Pr., vol. 14, p. 790-9; Hayne New Tr. & Ap., p. 250, sec. 87; *Arnold v. Skaggs*, 35 Calif., 684; *Baker v. Joseph*, 16 Calif., 180.

We quote the following from the opinion in the Baker case:

“The temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy involving considerable interest, and the circumstance that the testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing of diligence, and all other facts necessary to give effect to the claim.”

Under the well-established rules as laid down in the authorities cited, the affidavits in support of the motion for a new trial were wholly insufficient, and the trial court committed no error in denying the motion.

The judgment must be affirmed.

Affirmed.

[No. 3498.]

SHORE V. WALL.

EXECUTORS AND ADMINISTRATORS—*Removal of Administrator—Discretion of County Court.* The power to remove an administrator reposed by the statute (Rev. Stat., sec. 7120), in the county court, is largely discretionary. The action of that court should not be interfered with by any other court, unless an abuse of discretion is shown.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. P. L. HUBBARD and Mr. JOHN HIPP, for appellant.

Mr. A. M. STEVENSON and Mr. J. W. GILLESPIE, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

It appears from the record in this case that Albert Shore, of the city of Denver, died, leaving an estate which the district court finds to have been of the value of about twenty thousand dollars, and which consisted of a livery stable and the horses, carriages and other property belonging to such business.

He left five heirs—three brothers, of whom the appellant is one, one sister (the appellee), and a niece. The appellant was appointed administrator of the estate, and so acted for something more than a year and until the administrator had made his final report. This report seems to have been approved, but what, if anything, further had been done in the matter is not clear. The appellee, on the ninth of October, 1908, filed her petition in the county court, alleging incompetency and neglect upon the part of the administrator, and that property of the estate had been mixed with property of the appellant, and that the property of the estate had been mismanaged and wasted. The petition prayed for a citation to the administrator to show cause why he should not be discharged, and that upon a hearing the administrator be discharged, and another appointed.

Subsequently a hearing was had, and as a result, the final report of the administrator was set aside, the administrator removed, and another appointed. The matter was appealed to the district court, where it was again heard, and the action of the probate court sustained, or rather the district court declined to reverse the action of the county court. The reasons of the learned judge for his re-

fusal to disturb the action of the probate court were given as follows:

“First, that it was a matter within the discretion of the county court. Second, that the removal of the administrator is so placed in the county court, by statute, that so long as there is no abuse of that discretion, it should not be interfered with by any other court, nor the administration of the estate. Third, that it appears that there is much evidence, pro and con, relating to the facts, which the county court may have considered, and this court ought not, in reviewing such facts, determine that it would have held differently, and for that reason reverse the county court.”

The court seems to have given the case careful and patient hearing, and we see no reason to disturb its conclusions. These seem to correctly state the law in such case, and no authorities are cited by appellant to the contrary. The record indicates bitter personal feeling upon the part of the parties in interest, and which seem to have been largely shared by counsel.

There does not appear to be any good reason why the estate may not be fairly administered by the present administrator, and if such should not be the case, it is within the power, and it is the duty of the probate court to appoint another. We must assume that the county court, being in close touch with, and having a better knowledge of, the whole matter, will exercise a sound judgment and a wise discretion in the conduct of the affairs of the estates of deceased persons.

The judgment is affirmed.

All the judges concurring.

[No. 3502.]

COLLINS V. BAILEY ET AL.

1. PLEADINGS—*Amendment of Answer—New Defense.* To allow, pending plaintiff's motion for a new trial, an amendment of the answer setting up a new defense, upon which no sufficient or competent testimony was given upon the trial, is error.

2. — *Showing Cause.* So, to allow such amendment, without cause shown therefor, as required by the code (Mills' Code, sec. 75, Rev. Code 1908, sec. 81.)

3. — *New Trial.* Where, after verdict for the defendant, a new defense is received by way of amendment to the answer, it is the duty of the court to award a new trial.

4. LODE CLAIMS—*Following Dip of Vein.* The right to follow the dip of the lode granted by sec. 2322 of the Revised Statutes of the United States is in derogation of the common law, and whoever claims under the statute has the burden of proving the continuity of his vein from his surface ground into the premises of his neighbor. And the question is not to be left to the conjectures of the party, or even of expert witnesses, not supported by any competent testimony affording ground for an intelligent judgment.

Where the place of the alleged trespass upon plaintiff's vein was separated from the apex of defendant's vein by five hundred and fifty feet of unbroken ground, was distant from it longitudinally, at right angles, three hundred feet, there were many veins upon the same mountain of the same general dip and strike as the plaintiff's vein, and with the same character of ore, the only working or opening upon defendant's vein at the surface was a shaft of less than one hundred feet in depth, the only opening upon the vein at the point of the alleged trespass was an upraise of forty-five feet, and there was evidence that if the vein in such upraise continued in the same course to the surface it would have its apex within the plaintiff's surface ground, it was held that the opinion of engineers that the vein shown in the two openings was the same, was mere conjecture and too wild a guess to be accepted as proof.

Appeal from Eagle District Court. HON. CHAS. CAVENDER, Judge.

Mr. M. B. CARPENTER, for appellant.

SCOTT, P. J., delivered the opinion of the court.

On the 25th day of January, 1907, the plaintiff in this case filed his amended complaint in the district court of Eagle county alleging, substantially, that on the 1st day of September, 1906, he was and ever since and hitherto has been the owner in fee simple of the Australian, the Shamrock and the Hecla lode mining claims situated in the Holy Cross mining district in Eagle county; that he claims the right to occupy and possess said premises, and is entitled to the possession thereof, by a full compliance with the local laws and rules of said mining district, the laws of the state of Colorado, and by patents from the United States; and further, that the defendant, The French Mountain Mining Company, and the defendants, John W. Bailey, W. B. Brown and Edward Brown, on or about the first day of November, 1906, wrongfully entered into said claims and have ever since unlawfully held possession of the same, and have been extracting therefrom, as plaintiff is informed and believes, ores of the value of one hundred thousand dollars. The prayer was for recovery of possession of the several lode mining claims, for damages and for costs of suit. To this complaint there were filed the separate answers of the defendants, but all of these were similar and alleged, in substance, that as to whether or not the plaintiff was the owner of the claims mentioned in the complaint, defendants had not and could not obtain sufficient knowledge or information upon which to base a belief, and deny that on November 1st, 1906, or at any other time, the defendants or any of them, wrongfully or otherwise entered upon the said claims, or any of them, or at said date or since, or at any time, have wrongfully

held possession thereof, and deny that said defendants, or any of them, have extracted ore therefrom of the value of any sum whatsoever.

Upon this complaint and these separate answers the case was tried to a jury which returned a verdict in favor of the defendants in the following words: "We, the jury, find the issues herein joined for the defendants, and that the defendants, W. B. Brown and Edward Brown, are the owners, and the defendant, The French Mountain Mining Company, is the lessee, and entitled to the possession of the vein or lode opened and developed in the Hecla and Shamrock lode claims by what is known as the lower tunnel."

Pending a hearing on a motion for a new trial the court permitted the defendants, over the objection of plaintiff, to file a joint amended answer in which it was alleged, among other things, that the defendants further answering said complaint, and by way of counterclaim, allege that at all times mentioned in plaintiff's complaint the defendants, W. B. Brown and Edward Brown, were, and still are, the owners in fee simple of the Grand Trunk lode mining claim, situate in the Holy Cross mining district, state of Colorado; that on or about the day of August, 1904, they gave or extended a lease of, or bond upon said claim to the defendant, John W. Bailey, who thereafter and in May, 1906, assigned said lease and bond to the defendant, The French Mountain Mining Company, which, ever since said time, has been in the actual possession and occupancy of said lode and vein; and that said Grand Trunk lode lies parallel and adjacent to the Australian lode claim, and that the said Australian,

Hecla and Shamrock claims lie parallel to each other, in one body, with end lines practically upon one line; that the said defendant, The French Mountain Mining Company, cut and intersected at a point within the exterior sidelines of the said Australian, Shamrock and Hecla group, the Grand Trunk lode, and the vein thereof; that said vein so drifted upon by said company is the vein in controversy in this action, and is the only vein from which the defendants have extracted or taken out any ore in said tunnel. Defendants further allege that said vein is the Grand Trunk vein and has been disclosed and discovered along, upon and in the said Grand Trunk lode, and that said vein throughout its entire depth is the property of the defendants, as owners or lessees of the Grand Trunk vein, and as being a vein apexing upon and within the said Grand Trunk lode. It was further alleged that the plaintiff has no right, title or interest whatever in or to said lode, and that although the vein was cut at a point within the side lines of the Australian, Shamrock and Hecla group extended downwards vertically, the said vein was so cut, because in its dip it crossed the vertical side lines of the Australian lode, and that said vein in its dip extended into the ground beneath the surface of the said Australian and Shamrock claims, but continues at all times to the Grand Trunk vein apexing upon the Grand Trunk lode, and belonging thereto, and that said vein where the same is cut and developed in said tunnel is the identical vein located, opened up and developed on the surface of the Grand Trunk lode mining claim. Further, defendants disclaimed any right or title to said Australian, Shamrock and Hecla claims

except their right and title to the Grand Trunk vein so far as the same may lie beneath the surface boundaries of said Australian, Shamrock and Hecla claims, between vertical planes drawn downward through the end lines of said Grand Trunk lode, so continued in their own direction that such planes will intersect such exterior parts of such vein or lode, and their right to remove ore and other material from their said Grand Trunk lode. The defendants prayed that the defendants, W. B. Brown and Edward Brown, be adjudged to be the owners, and the defendant, The French Mountain Mining Company, be adjudged to be the lessee and entitled to the possession of the alleged Grand Trunk lode or vein, cut within the side lines of plaintiff's lode claims.

After this answer was permitted to be filed, the court overruled plaintiff's motion for a new trial and rendered judgment in substance, that the defendants are entitled to the possession of the vein or lode in dispute in this action, opened up and disclosed within the side lines of the Hecla and Shamrock claims as a vein or lode apexing within the lines of the Grand Trunk lode and a part thereof, the defendants, W. B. Brown and Edward Brown, being so entitled as the owners thereof, and that plaintiff has no right, title or interest therein whatever. It was further adjudged, that said vein is in fact the Grand Trunk vein, belonging to and having its apex upon the Grand Trunk lode, and that the title, rights and interests of the defendants are hereby quieted and confirmed as against the said plaintiff, and all persons claiming under him, and that said plaintiff, his agents, servants and attor-

neys are hereby enjoined and restrained from asserting or claiming any right, title or interest in said vein, or in any ore taken from said vein, and from in any manner interfering with said defendants or their heirs or assigns, or any of them, in their working of said vein or lode upon the dip thereof, or in the extraction, treatment, sale or disposal of ore therefrom, unless it shall hereafter be shown that the apex of said vein departs from the Grand Trunk claim, in which event the plaintiff shall have leave to apply for a modification of this order, and decree to the extent owned by such departure.

The case was thereupon appealed to the supreme court and is now before this court for review. Before the case was submitted to the jury plaintiff moved for a directed verdict upon the ground that defendants had not proved any continuous vein or body of ore from the ground of defendants into the patented ground of plaintiff, within the meaning of the acts of congress, and that the continuity and dip were not established by competent or any testimony.

The following instruction is likewise complained of: "The jury are instructed that in determining whether a vein is continuous in its downward course, it is not necessary that the vein should be opened up or disclosed for the entire distance, but you must take into consideration all the facts shown as to the dip or incline of the vein, its geological and mineral character, and of the walls, and from the whole evidence decide whether it is the same vein in fact."

It was agreed that plaintiff was the owner of

the Australian, the Shamrock and the Hecla lodes, and that the defendants were the owners and lessees of the Grand Trunk lode; that the ore being removed, and the workings in dispute, are within the lines of the Hecla, and between which and the Grand Trunk lie the Shamrock and the Australian, is likewise admitted. So that the claim of the defendants in this case arises solely upon their contention that the vein so being worked in the Hecla, apexes in the Grand Trunk. The errors assigned and which seem necessary to consider are (a) the refusal of the court to direct a verdict for the plaintiff, (b) the order of the court allowing defendants to file an amended answer to conform to the proof, (c) the giving of the instruction to the jury heretofore set out, over the objection of the plaintiff.

It will be seen that the answer of the defendants upon which the case was tried was simply the denial of ownership and the right to possession by plaintiff of the lode claims set out in the complaint. While the amended answer permitted to be filed after verdict was returned, set up an affirmative claim to the vein, admitted to be within the plaintiff's ground, by reason of defendant's claim of apex right. This was a new and different cause of action from that set up in the original answer, and upon which the case was tried.

The appellate courts of this state have been liberal in the matter of the allowance of amendments to pleadings, and particularly so as applied to answers. In the case of *Cartwright v. Ruffin*, 43 Colo., 377, it was held that amendments to pleadings are largely in the discretion of the trial judge, and unless clearly abused, such discretion ordinarily will

not be interfered with on appeal. It was there further held that greater liberality is necessarily allowed in the matter of amendments to answers than to complaints, especially under code practice, and that this liberality is some times extended to the admission of entirely new defenses.

While the question of the amendment presented for consideration in that case was not determined, yet it was characterized as radical. Neither do we find it necessary to determine whether or not the amended pleading in this case, as such, was allowable. Yet in view of the finding hereinafter stated, as to the failure of proof upon the part of the defendants, we hold that for such reason the amendment was not proper.

But if the amended pleading be considered as permissible and within the discretion of the court, then under the practice, it was the duty of the court in this case to have granted a new trial, and to have thus permitted the parties to try the case upon the new pleadings.

“At common law the court has power to allow an amendment of the pleadings in a case until final judgment; and authority is given by statute in most of the states to allow amendments after as well as before judgment by the insertion of new allegations material to the case. Although this is an extraordinary power and should be sparingly exercised, amendments have been allowed under special circumstances even after satisfaction of the judgment. If the amendment is allowed, the judgment should be vacated in order to give the opposite party an opportunity to controvert the new allegations;

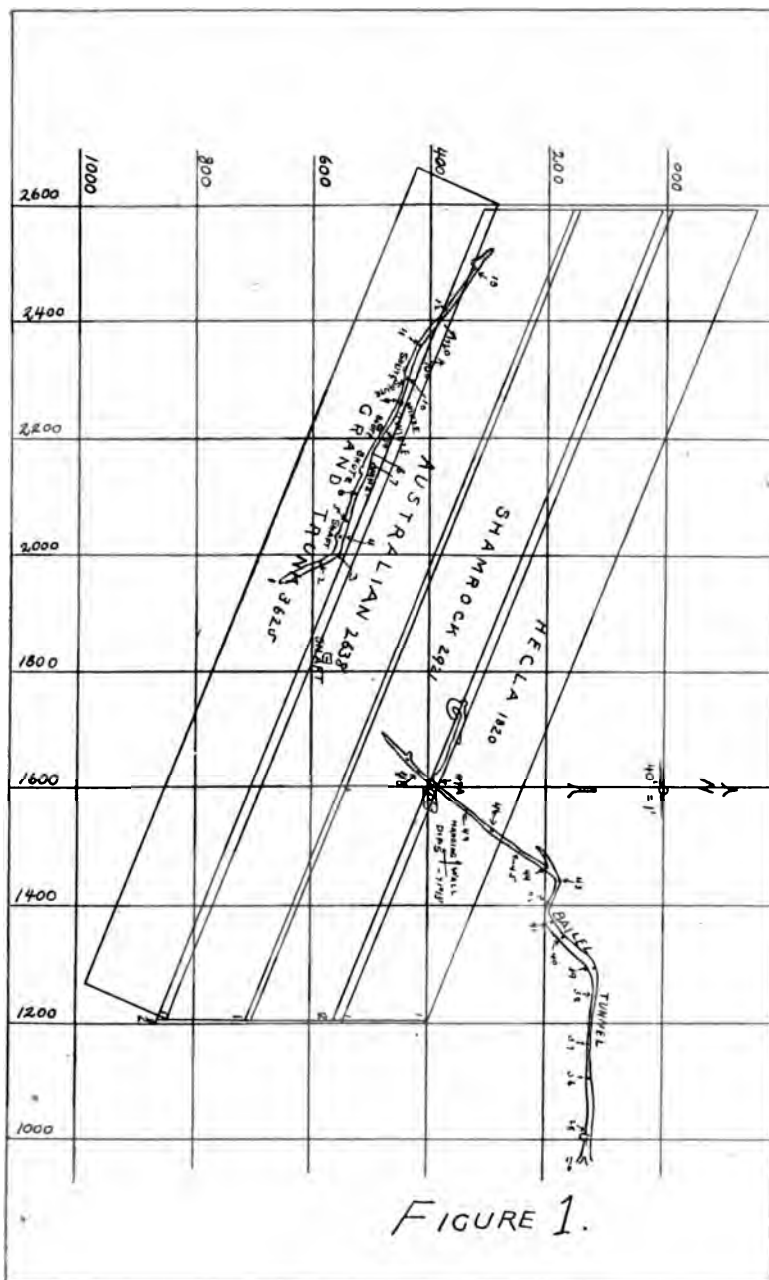
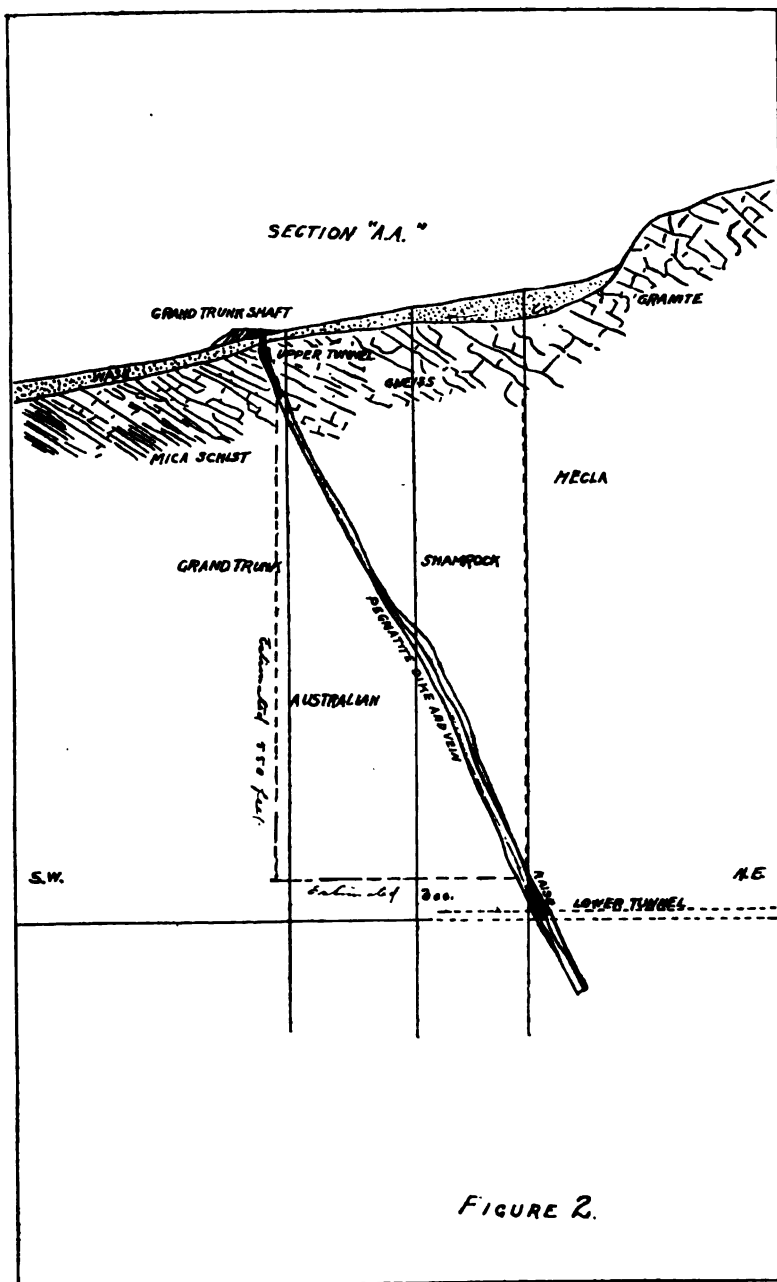


FIGURE 1.



or a separate trial should be had upon the new issues." 1 Am. & Eng. Enc. Pl. & Pr., 605, 606, 607.

Therefore the refusal of the court to grant a new trial after allowing the amended answer to be filed, and thus to permit the case to be tried upon the pleadings as amended, was error. The verdict and the judgment were wholly at variance with the defendant's pleadings upon which the case was tried, and it has been held that the judgment obtained through a clear departure from the issues joined, cannot be sustained. *Jackson v. Ackroyd*, 15 Colo., 583.

The court's action in allowing the amendment was also in violation of the code provision requiring a showing to be made.—Mills' Ann. Code, sec. 75. The motion for a new trial should have been granted.

From what has been said the judgment should be reversed; but, inasmuch as the case may be again tried, it seems proper to consider the remaining questions. From a careful study of the record it seems quite clear that there was a failure of proof as to the defendant's claim of apex-right. In order to understand the issue it will be necessary to consider the following sketches, to which we will refer as figures 1 and 2, respectively. Figure 1 shows the surface lines and location of the lode claims involved. It also shows the line of the tunnel and the location of the shaft, also the workings on the Grand Trunk lode, referred to in the record as the "upper tunnel." Figure 2 is intended as a sectional view showing the shaft on the Grand Trunk sunk a short distance below the level of the upper tunnel, which last appears to be about 30 feet below

the surface, and also shows what is known as the "up-raise" in the lower tunnel on the Hecla claim, as well as the supposed course of the vein between these points, an estimated vertical distance of 550 feet, all of which was wholly uncovered and unexplored.

The shaft on the Grand Trunk is testified to by the defendant Bailey as extending about 50 feet below the level of the upper tunnel, but by reason of water therein, not examined by other witnesses. The up-raise in the Hecla is estimated to be about 45 feet vertically upward from the level of the lower tunnel, but constructed through the ore in a sort of circular stairway form, reaching and exposing a small portion of both walls, but always at different places. Bailey testifies that the shaft from the tunnel level in the Grand Trunk, follows the dip of a vein to the bottom of the shaft. These maps, and the record, except as to figure 1 where the surface lines are from actual survey, are made from alleged surveys of others, not in evidence, and the seeming guess and speculation of the makers of the maps. The dip of the vein in the Hecla, as far as exposed, seems to compare with the dip of the vein, so far as disclosed, in the Grand Trunk, but there seems to be so little of either vein exposed that estimates in that regard are, of necessity, largely conjectural. The character of the ore in the Grand Trunk tunnel is said to be the same as that in the lower tunnel, except that the ore in the Grand Trunk is oxidized. The witness, Bohmer, for the defendants, says that he also bases his opinion that the vein disclosed on the Hecla and that appearing on the Grand Trunk, are one and the

same vein, because of a dyke running through the mountain, paralleling the supposed vein, and he designates this formation as mica-schist, gneiss and granite, as indicated in figure 2. But where one of these formations begins and another ends is no clearer in the testimony than it appears in the map. Besides, there is no evidence as to the dyke in the several formations suggested, except as it may appear in the lower tunnel. It is true that Bailey says that the vein as disclosed in the Grand Trunk and in the Hecla is the only vein on the mountain; but the witness, Horace Havens, testifies as to the Pelican and Pelican Extension veins, which show on the surface for a thousand or fifteen hundred feet, and that the Mollie vein has always been considered by those operating it as one of the strongest veins in that country. These veins are all in the same mountain as the ground in dispute. Havens further testifies that he had worked in all of these veins and was familiar with the ores in them; and that they were of the same character as that in the Hecla. He further testifies that all of these veins are of the same general dip and strike as those in the Hecla and Grand Trunk. Havens is corroborated in this testimony by the witness Happel, who testifies he has worked on his own claims, the Three Nations and the Mack, also the Virginian, Grand Trunk, Pelican, Comstock and Great Western, all in the same locality, and that the veins are all similar, having the same character of ore, the same character of walls, and all about of the same dip. This, with other testimony in the case, seems to make the declaration of Bailey that there are no other veins in that mountain, appear absurd. Boehmer, the en-

gineer, testifying for the defendants, on cross-examination, says:

Q. Why did you mark this lower tunnel, when, as a matter of fact, the lower tunnel is two or three hundred feet away? A. It is projected on. That dotting is on there to show that.

Q. Why did you change the course and dimensions of that streak? A. I platted that from the dips that I took in the lower level, the average was 67 degrees. I drew that line 67 degrees, and the upper one I found 65 degrees, and I started that from the upper workings and then connected with an irregular line.

Q. Had you projected with the 67 degrees, it would come out in the Australian? A. Yes, if that line was projected it would come out in the Australian.

Q. So if you take the dip of the vein, as shown in the lower workings, and project that to the surface, with that same angle, it would come out in the Australian? A. Yes, it would.

Q. And not on the Grand Trunk, at all? A. Yes, sir.

Q. When you got about here to this line, between the Shamrock and the Australian, then you commenced to give off towards the Grand Trunk? A. Yes, sir.

Q. Why? A. Because the vein up there is within the Grand Trunk, and not the Australian, and you have to connect vein with vein, and could not connect any dip you happen to find.

Q. In other words, you must connect whether it is solid rock or not? A. Yes, sir, you must connect vein with vein.

Q. Did you go up here to examine and find if there was a vein on the surface? A. No, I couldn't see anything there.

Q. Then the upper exhibit is conjecture beyond the end of the drift so far as the lower tunnel is concerned, and conjecture so far as the upper tunnel is concerned down this way to the east? A. No, not the upper one. That is put on by the evidence of Mr. Bailey. I didn't see that myself.

Q. So far as you are concerned. A. So far as I am concerned, yes.

Q. Why didn't you take Mr. Bailey's word for this up-raise in the lower tunnel workings? A. I could get at that."—Transcript of Record, folios 182, 183, 184.

This testimony shows clearly that if the vein continued on the angle of the dip estimated by the witness as being the angle in the lower tunnel, the vein would come to the surface on the Australian, and not on the Grand Trunk, as contended by the defendants. It likewise discloses the uncertainty of his information upon which he relied to make the map, figure 2. This witness also testifies, and there seems to be no other contention, that the top of the up-raise in the Hecla is 550 feet lower, vertically, than the bottom of the Grand Trunk shaft, and also 300 feet distant, at right angles, from the bottom of the Grand Trunk shaft, as well as 200 feet nearer the southerly end lines of the claims. It will be seen that if this is a fair statement of the substance of the testimony the conclusion that the workings in the Hecla are in the vein said to apex in the Grand Trunk, is the result simply of conjecture and speculation; and, considered in its most fa-

avorable light for the defendants, is not sufficient upon which to base a verdict and judgment in their favor.

Section 2322 Rev. Stat. U. S. conferring what is commonly known as the apex right, is in derogation of the common law which granted to the owner of lands all veins within the vertical lines of his land to the center of the earth, and it has been generally held in the determination of cases under this statute, that the presumption is with the owner of the lands as to his right to veins and ore bodies within his vertical side lines.

It was said in *Stevens v. Gill*, 23 Fed. Cas., No. 13398, that "the burden of proof is upon the plaintiffs claiming the apex, both because they are the plaintiffs, and because they are seeking to go out of their own territory into that of others." This seems to be the universally accepted rule of appellate courts including our own. Again, to establish such a claim, and from the very nature of the case, there should be at least a reasonable degree of certainty in the proof.

The following statement of the rule is perhaps as fair as can be selected from the reported cases in this regard:

"The act of congress, sec. 2322 Rev. St., gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim as those lines are extended vertically, but it gives him the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally. But this right is dependent, outside of the lateral limits of the claim, upon its being the same vein as that within those

limits. For the exercise of this right it must appear that the vein outside is identical with and a continuation of the one inside those lines. But if the mineral disappears or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants' survey is gone." *Iron Silver Min. Co. v. Cheesman*, 116 U. S., 529.

To say then in this case, that the alleged apex on the Grand Trunk is that of the vein appearing on the Hecla at a wholly unexplored distance of 550 feet, with a right angle distance of 300 feet, and an additional extended distance lengthwise of the claims 200 feet, is to base such conclusion upon mere speculation.

Particularly is this true in the light of the scant development at either point, and the slight and uncertain evidence as to the formation. Thus by these figures of the engineer from a point at the bottom of the shaft on the Grand Trunk to a point at the top of the up-raise from the tunnel in the Hecla would be in a straight line through the earth a distance of approximately 657 feet, all of which is unopened, unexplored and the character of which is wholly unknown. To conclude under this state of facts that this distance is traversed by a single continuous vein of which these two points are the only opened and exposed parts, is little short of absurd.

We can find no case wherein such a wild guess has been accepted as proof. In fact the most that can be said in favor of such a conclusion is that it is the opinion of an engineer. But in view of the many worked and ore bearing veins in the same lo-

cality, on the same mountain, with similar dip and strike, this opinion can be regarded as but little if anything beyond a guess and mining engineers cannot be said to be infallible as guessers.

It was said in *Heinze et al. v. B. & M. Co.*, 30 Mont., 485:

"The plaintiffs have not by their operations so developed their own workings from the apex of their vein down to the disputed territory as to furnish substantial evidence that their claim is probably well founded. Indeed, while they concede that there is a vein in the defendant's ground dipping to the south, their own contention is based exclusively upon the opinion of their engineers that, if the vein having its apex in the Minnie Healy ground continues to dip at the same angle from certain points where it is exposed in the upper levels in their workings, it will reach the point where the defendant is conducting its operations. This is not sufficient to overcome the presumption that the defendant owns the ores found beneath its own surface. This presumption may not be overturned by speculative conjecture or even intelligent guess."

As we read the facts in the case of *Colo. Cent. Con. Min. Co. v. Turck*, 50 Fed., 888, they were much more favorable to the apex claimant in that case insufficient upon which to base a verdict and judgment in the case at bar. And the testimony was there held to be mere speculation. The proof was insufficient upon which to base a verdict and judgment.

The instruction complained of was misleading, if not erroneous in this case. It might have been allowable in a case where a vein had been opened

and identified for substantial distances and at points in close proximity, but even in that case it should have been qualified and amplified so as to permit a finding based only upon a state of facts sufficient to reasonably justify such a conclusion. It should have denied the right of the jury to guess, speculate or conjecture.

Judgment reversed.

All the judges concurring.

Decided April 8, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3503.]

WEBERMEIER V. WHITE.

APPEALS—Findings of Fact—Presumption. Where the evidence heard in the court below is not set out in the record sent to this court, the findings below are conclusive as to the facts.

Appeal from Phillips District Court. HON. H. P. BURKE, Judge.

Mr. J. S. BENNETT, for appellant.

Messrs. MUNSON & MUNSON, for appellee.

SCOTT, P. J., delivered the opinion of the court.

This is an action by the appellee to quiet title to southeast quarter of section 8, township 7, range 43 west, 6th P. M., in Phillips county. The abstract of record contains only the complaint and original answer, together with the court's findings and decree. The court, in its findings, refers to an amended answer, but if there was such an instrument filed, it does not appear in the abstract of record. The

abstract fails to show any of the testimony offered by either party—not even the tax deed upon which the appellant relies. The court's findings of fact and its judgment are, therefore, all that are before us for consideration. From these it appears that at one time, title to the premises was in one Robert Cummins, who gave a trust deed, to whom and in whose interest does not appear; that the trustee refused to act, and that in an action in the county court, by whom or against whom, or for what purpose, is not disclosed, but that the sheriff of the county was appointed by the court to act as trustee; and that foreclosure proceedings were then had and the premises sold thereunder, and a deed subsequently issued to The Commercial Investment Company, who in turn conveyed it to the plaintiff below, appellee here. The findings further show that the grantor in the trust deed was made a party defendant in the foreclosure proceedings, but that such grantor had, prior to the service of summons in that case, conveyed his equity to one Melissa Works. The court further finds that the appellant claims under an amended tax deed secured to remedy defects of a former tax deed admitted to be void on its face. That such amended tax deed was executed and delivered after a tender by the plaintiff to the county treasurer of the amount of money necessary to redeem the land from the sale upon which the tax deed was based. Further, the court finds that the tax deed relied on "conveys no title, because it is established by the evidence that the proceedings leading up to its issuance were void, by reason of a failure on the part of the county treasurer to make his affidavit of posting of notice of sale as

provided by law, and because the land was advertised for sale for an excessive amount."

There being no evidence set out in the record, we must accept these findings as being conclusive as to the facts.

Then the defendant below had no title or evidence of title, either legal or equitable, upon which he could sustain his right to question the legality of the proceedings upon which the title of the plaintiff was based.

The judgment is affirmed.

All the judges concurring.

[No. 3504.]

NEWCOMB V. HENDERSON.

1. **TAX TITLE—Void Deed.** A tax deed which shows upon its face that the land was struck off to the county on the day upon which it was first offered is void. *Bryant v. Miller*, 48 Colo. 192, followed.

2. — *Lands Assessed Jointly and Sold in Parcels.* The sale in parcels of a body of land assessed as a whole is a violation of the statute (Mills' Stat., sec. 3888, Rev. Stat., sec. 5713). One contesting the sale is not required to prove that he has sustained damage by this violation of the statute.

Appeal from Logan District Court. HON. H. P. BURKE, Judge.

Mr. E. S. ALLEN and Mr. I. J. DOKE, for appellant.

Messrs. MUNSON & MUNSON, for appellee.

CUNNINGHAM, Judge.

Appellee, plaintiff below, brought his action in the district court to quiet title to the south half of

a certain quarter section of land, situate in Logan county. Unless a certain tax deed offered in evidence by the defendant, and excluded by the court, was valid, the judgment in favor of appellee was proper, and must be affirmed.

Plaintiff asserts that the tax deed above mentioned was void on its face, for the reason, as he contends, it shows that the land described in it and involved in this action, was bid in by the county on the first day it was offered for sale by the county treasurer, contrary to sec. 3888 M. A. S., sec. 5713 R. S., then in force.

1. It is true, as appellant contends, the deed does not recite in terms that the property was *not* offered on the first day of the sale, to-wit: October 29th. Therefore, he asserts, from the recitation in the deed, that the land was "struck off to the said county, and certificate of sale was duly issued therefor to the said county, *in accordance with the statutes* in such case made and provided," and from recitations of similar import we must infer, in the absence of proof to the contrary, that the treasurer did offer the land on the first day of the sale, and that it was not sold on the first day it was offered. This precise contention has been determined adversely to appellant's views in *Bryant v. Miller*, 48 Colo., 192. The deed before the court in the Bryant case was precisely like the deed in the present case, and there is no difference in the facts, hence it follows that the deed, offered and excluded by the trial court in this case was, under the doctrine laid down in the Bryant case, void on its face.

2. From the testimony of the county treasurer and by his records, it is made to appear that the

land was assessed as a part of a full quarter section, but sold in forty-acre tracts or subdivisions. This is contrary to sec. 3888 M. A. S., and sec. 5713 R. S., which provide as follows:

“Where there are two or more lots or tracts of land valued and assessed jointly, the treasurer shall sell the same jointly as assessed.”

Appellant admits that the records of the county treasurer do show that the land was offered and sold in forty-acre tracts, although assessed as a part of a one hundred and sixty-acre tract, but he contends, as we understand the argument, that this plain violation of the statute can avail appellee nothing unless and until he shows that he has been prejudiced thereby. The record shows that the two tax certificates were issued for the two forties constituting the eighty in question, and these two certificates were later assigned by the county to appellant's grantor. We think it may be assumed, in the absence of evidence to the contrary, that the sale of land for taxes in separate tracts requires the issuance of extra certificates, and entails additional costs. Once it be shown that a positive mandate or statute has been ignored in connection with a tax sale, the grantor under a tax deed flowing therefrom, will not be heard to say that his adversary must go further and prove the damages he has suffered as a result of the violation of the statute. No attempt was made on the part of appellant to offer proof tending to establish that the irregularity in the sale of the land, in the particular pointed out, occasioned the fee owner no extra expense or cost, therefore, it is not necessary for us to determine whether a violation of a statute resulting in no

prejudice to the fee owner does or does not invalidate the tax deed which follows it, and for this reason we express no opinion on the question.

The tax deed offered by appellant was properly excluded, and the judgment will be affirmed.

Affirmed.

WALLING, Judge, concurs in the result, and so much of the opinion as is based upon the ruling announced in the case of *Bryant v. Miller*, 48 Colo., 192.

[No. 3505.]

FRANTZ STORES CO. v. WRIGHT.

1. FRAUDULENT CONVEYANCES—*Evidence.* A creditor, knowing his debtor to be insolvent, accepts goods in satisfaction of his debt, paying the debtor in money the difference between the amount of the debt and the value of the goods. Such payment is only evidence of a fraudulent intent on his part, and not necessarily conclusive.

2. APPEALS—*Finding on Sufficient Evidence*, will not be reviewed.

Appeal from Boulder County Court. HON. E. J. INGRAM, Judge.

MESSRS. MILLER, BARND & WILLIAMS, for appellant.

MESSRS. HAWKINS & DOWNER, Mr. L. O. HAWKINS, for appellee.

CUNNINGHAM, Judge.

Plaintiff brought its action against John and Nellie Wilson in a justice of the peace court, on a money demand. A writ of attachment was sued

out, and a levy made thereunder on certain personal property, as the property of John and Nellie Wilson. Wright intervened, claiming title to the goods in virtue of a bill of sale from the Wilsons to himself. From a judgment in favor of the plaintiff, intervenor, Wright, appealed to the county court, where, on a trial to the court without a jury, he prevailed.

1. It is contended by the appellant that the sale and transfer of the goods from the Wilsons to Wright was fraudulent, and wholly void as to plaintiff, who was a creditor, and if not wholly void, at least partially void. Wright claimed to be a creditor of the Wilsons, and that he took the goods in payment for a debt they owed him, and paid them a small balance in cash for the goods. Plaintiff contends that even though the debtor may prefer a creditor, that where one creditor takes goods in payment of a debt, and pays a balance in cash, where he knows of the insolvent condition of his creditor, the whole transaction becomes void as to the other creditors. We think this contention is not sound. The payment of the money, under such circumstances, is but evidence of fraud, and not necessarily conclusive of the question.

Otis v. Rose et al., 9 Colo. App., 449; 48 Pac. 967.

2. The trial judge, after hearing the evidence, which was conflicting on practically all of the material points, found that there was no fraud in the sale and transfer of the goods by the Wilsons to Wright, and upheld the same.

We can not say, as a matter of law, that the evidence, viewed in the most favorable light to the

intervenor, is not sufficient to sustain the findings of the trial judge in this behalf, and the judgment based thereon.

Otis v. Rose et al., supra. First National Bank v. Kavanaugh, 7 Colo. App., 160; 43 Pac., 217. *Roberts v. Larson et al.*, 48 Colo., 120; 109 Pac., 261.

There is no law question fairly involved, and the only error discussed is the alleged insufficiency of the evidence to support the judgment.

The judgment will stand affirmed.

Affirmed.

REYER ET AL. V. TEARE.

[No. 3822.]

1. *APPEAL—Freehold Involved.* In an action in which lands are attached judgment in damages is given in favor of an intervenor claiming title to the lands. The freehold is not involved. *Scheerem v. Stramanf*, 24 Colo. 111, followed.

2. — *Abstract—Defective—Motion to Dismiss.* The privilege granted by rule 6 of the court to the appellee, to file a supplemental abstract, is not to be construed as absolving the appellant from the duty to observe the requirements of rule 5. Upon motion to dismiss an appeal for manifest defects in the abstract, it appearing that the defects were not due to any improper motive the appellant was allowed to file a supplement, remedying such defects, within a day specified.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. CHARLES B. WARD, MR. NORTON MONTGOMERY, MR. HORACE N. HAWKINS, for appellants.

MR. ROBERT M. WORK, MESSRS. VAN CISE, GRANT & VAN CISE, for appellee.

Per Curiam.

Appellants, as plaintiffs below, filed suit in the district court against one Blaisdel, and sued out a writ of attachment which was levied on a tract of land. Teare intervened, claiming title to the land. After issues joined, judgment went in favor of Blaisdel; the defendant, and Teare, the intervenor, the latter being awarded damages in the sum of two thousand dollars. Appellants sued out a writ of error in the supreme court for the purpose of reviewing so much of the judgment as went in favor of Blaisdel, the original defendant, and appealed from that feature of the judgment favorable to the intervenor. Under the act creating this court, the appeal has been transferred here. Appellants have filed a motion to remand, and appellee a motion to dismiss the appeal. The motion to remand appears to be based upon the assumption that a freehold is involved. Under the ruling of the supreme court in *Scheerem v. Stramann*, 24 Colo., 111, this assumption is groundless, and the motion to remand is denied.

The motion of appellee to dismiss the appeal is based upon two grounds:

1. The inadequacy of the abstract of record filed in the case.
2. That the appellants are without authority to maintain their appeal without bringing up the entire record and including all the parties.

The abstract of record is radically defective in many respects pointed out in the brief filed by appellee. It is not necessary, we think, to specify the defects. While it is true that if an appellee be not satisfied with the abstract of record filed, he may, under rule 6 of this court, file a further or ad-

ditional abstract, this privilege granted the appellee may not be construed as absolving appellant from all obligations to observe the simple and reasonable provisions of rule 5 of this court. We are satisfied that the defects in the abstract are not due to any improper motive on the part of appellants, therefore they will be given twenty days in which to prepare and file a supplemental and additional abstract. If within that time a satisfactory abstract be filed, the motion to dismiss the appeal will stand for further consideration on the question of the right of the appellants to maintain their appeal on the record brought up, and counsel are permitted to file additional briefs, limited to that question alone.

Appellee will be given ten days after receipt of a copy of the supplemental and additional abstract to file such brief. Appellants may have ten days after receipt of copy of appellee's brief, to file their answer brief, and ten days will be given appellee after receipt of appellants' brief, to file a reply brief. However, in the event the supplemental abstract of record be not filed as hereinabove provided, the motion to dismiss the appeal will be granted.

[No. 3510.]

CLARK HARDWARE CO. V. CENTENNIAL TUNNEL MIN-
ING CO. ET ALS.

1. *MECHANIC'S LIEN—Complaint.* A mere allegation that as to one of the defendants plaintiff has been informed that the party "claimed some interest of record in the above described property," no attempt being made to state the nature of his interest, or that it is subject to the lien, is not sufficient.

Where it is sought to enforce a lien upon a mining claim for materials contracted for by a lessee, it is sufficient as against a general demurrer to allege that such materials were used in the development, etc., of the property with the knowledge of the owner. It is not required to show that by the terms of the lease, development or improvement was required.

And the complaint need not aver that the owner failed to give notice that he would not be responsible, under the statute.

The complaint need not describe the structures in which such material was used.

2. — *Improvements Made by Lessee.* The act of 1899 (Laws 1899, c. 118, Rev. Stat., sec. 4029), gives a lien in favor of those performing labor or furnishing materials by contract with the lessee, unless the lessor gives the notice required by the act.

In default of such notice, the lessor is deemed to adopt the act of the lessee as his own.

That such notice was given by the lessor is an affirmative defense which he must plead.

3. — *Statement of Lien—Time of Filing.* A statement of the lien filed within two months of the time when the last material, was furnished is in due season.

4. *PERSONAL JUDGMENT.* Even where no lien is allowed, the plaintiff is entitled to a personal judgment for the value of materials furnished at request of the defendant.

5. *PLEADING—Averments Made on Information.* The allegation that plaintiff "has been informed" of a certain state of facts is not an allegation of the fact, and its denial raises no issue.

6. — *Demurrer.* Ambiguous or indefinite statements are not to be assailed by a general demurrer.

7. *PARTIES—Substitution.* A complaint to enforce a mechanic's lien, following the Lien Statement required by the statute, named an individual as one of the defendants, and a certain company, averring that the material was furnished to the individual while doing business under the name of such company, and at his request. It averred a lack of information as to whether the company was a corporation or a partnership. An amended complaint alleged the incorporation of the company, that the material was furnished to it, and joined it in its corporate capacity, praying judgment against it and praying nothing against the individual. Held, that by this substitution no injury was occasioned to the owner of the property, who was also joined as defendant, and that the amendment was warranted by sec. 82, Rev. Code, and sec. 4306, Rev. Stat.

Appeal from Gilpin District Court. HON. CHARLES C. McCALL, Judge.

Mr. W. C. FULLERTON, Mr. BROOKS FULLERTON and Mr. WILLIAM E. WITHROW, for appellant.

Mr. JAMES M. SERIGHT, for appellees W. C. FRANK, THE CENTENNIAL TUNNEL MINING COMPANY, THE HILLSIDE MINING AND MILLING COMPANY.

CUNNINGHAM, Judge.

March 2, 1905, appellant brought suit in the county court of Gilpin county to foreclose its mechanic's lien on a portion of the Hamlet Lode claim, a lease-hold interest therein alleged to belong to the Hillside Mining and Milling Company, and the improvements and fixtures, consisting of buildings and mining machinery situate on said claim. To this complaint defendant Frank answered, alleging ownership of the buildings and machinery. The Centennial Tunnel Mining Company answered, admitting ownership of the real estate, and denying ownership of the fixtures or equipment of the mine, and denied the remaining material allegations of the complaint. Brereton answered, disclaiming any interest in the property. Judgment went in favor of all the defendants except W. H. Simmons, and the lien was discharged. Appeal was taken to the district court, where an amended complaint was filed on January 16th, 1909. As to the regularity of the proceedings whereby the amended complaint was filed, we need not inquire, as no question is presented for our consideration concerning that feature. The Hillside Mining and Milling Company

was made a party to the amended complaint, which contained the following allegations pertaining to said company: "That it was a Colorado corporation; that it was in possession of and working the Hamlet lode as lessee, and had a leasehold interest in said premises; that it held and owned certain mining machinery and fixtures located on said claim, and essential to the operation thereof (describing them); that the goods, wares and merchandise for which the lien was claimed had been furnished by appellant to the said Hillside company; that there was a balance of \$430.87 due and unpaid from the said Hillside company to appellant; that the material and merchandise furnished the said Hillside company were consumed by it while working and developing the Hamlet lode claim, and the same were so furnished and so used with the knowledge of The Centennial Tunnel Company, and of its president. The name of W. H. Simmons appears in the caption of the amended complaint in the same way in which it appeared in the original complaint, namely, "W. H. Simmons, doing business under the name of The Hillside Mining and Milling Company." Otherwise the said Simmons' name does not appear in the amended complaint, except in the lien statement, which is set out in full, but which, of course, constitutes no part of the allegations thereof. In the lien statement thus set out in the amended complaint, it is stated that "appellant nor its agents or attorney is able to obtain knowledge or information sufficient on which to base a belief as to whether the said Hillside Mining and Milling Company operated under that name, as lessee above named, by W. H.

Simmons, was a corporation sole or aggregate, or a partnership so operated by said W. H. Simmons."

It further appears in the lien statement that the merchandise for which the lien was claimed, was furnished "at the instance and request of the said W. H. Simmons, doing business under the name of The Hillside Mining and Milling Company, while the said W. H. Simmons, as such Hillside Mining and Milling Company, was in actual operation of said mine under lease and bond."

It further appears from the lien statement "that this lien is claimed for and on account of material * * * furnished said W. H. Simmons, while he was doing business under the name of The Hillside Mining and Milling Company * * * at the instance and request of the said W. H. Simmons * * * that all of said materials * * * were furnished at the special instance and request of the said W. H. Simmons, under the name of The Hillside Mining and Milling Company," etc.

The same or similar allegations with reference to the relation of Simmons to the lien claimant and The Hillside Company, appear through the lien statement.

The appellees, the Centennial and the Hillside companies, and Frank, filed separate demurrers. Brereton, having disclaimed in the county court, made no appearance in the district court, and Simmons made no appearance in either court. The demurrers of the defendants, and each of them, were sustained in the district court, and the plaintiff, declining to plead further, but electing to stand on his amended complaint, judgment was entered in favor

of each of said defendants so demurring, from which judgment the case is brought to this court on appeal for review. We will consider the demurrers in their order.

1. The only allegation as to the defendant, Frank, was:

“This plaintiff further alleges that since filing said lien statement, it has been informed that said defendant, W. C. Frank (who was not mentioned in the lien statement) claims some interest of record in the above described property, or some part thereof.”

No effort was made to state the nature of Frank's interest, nor was it alleged that said interest was subject or inferior to plaintiff's lien claim. It appears from the allegation that Frank's claim of interest was a matter of record, hence presumably accessible to plaintiff. Appellant quotes the following from section 4035 R. S.:

“The owner or owners of property to which such lien shall have attached, and all other parties claiming of record any right, title, interest or equity therein, whose title or interests are to be charged with or affected by such a lien, shall be made parties to the action.”

While the statute requires that Frank (claiming a right of record) should be made a party, it does not relieve appellant from the duty ordinarily devolving upon a plaintiff, of stating a cause of action against one whom he hales into court.

Delahay v. Goldie, 17 Kans., 263; *Tobenkin v. Piermont*, 114 N. Y. S., 948; *San Juan Hdw. Co. v. Carrothers*, 7 Colo. App., 413.

Counsel for appellant call attention to the fact that the San Juan Hardware Company case was brought under the lien act of 1883, which did not require third persons, not lien claimants under the act, to be made parties, as does the act of 1899, under which this action was brought. Nevertheless, we think the general rule which requires that a cause of action shall be stated against one who is made a defendant, is reasonable, and should and does obtain under the act of 1899. It is clear that section 4035 R. S. does not, at least in terms, relieve the plaintiff from such duty. Had the legislature desired or intended so to relieve a plaintiff bringing his action under the act, it would doubtless have employed apt words to effectuate such purpose, as it did do in the succeeding act, relating to other lienors, who base their claim upon the act in question. Section 4036 R. S. provides:

“It shall be sufficient to allege in the complaint, in relation to any party claiming a lien, when [whom] it is desired to make a defendant, that such party claims a lien under this act upon the property described.”

Moreover, it is not alleged that Frank claimed an interest. Had Frank denied the allegation, no material issue would have been thereby raised. Whether the plaintiff had, or had not, been *informed* that Frank claimed an interest, was a matter of no consequence. The demurrer was filed and sustained, not on the trial, but before answer, hence plaintiff was afforded every reasonable opportunity to amend its complaint, but declined so to do. The demurrer was properly sustained, and the judgment in favor of Frank correctly pronounced.

2. We will next proceed to consider the action of the trial court in sustaining the demurrer of the defendant The Centennial Tunnel and Mining Company. This demurrer was based upon three grounds:

(1) The alleged insufficiency of the complaint to state a cause of action.

(2) The alleged insufficiency of the complaint to establish a lien.

(3) The lien statement was not filed in time, and the failure of the complaint to mention any buildings, structures or improvements.

Since no personal judgment was sought against this defendant, the first two grounds of the demurrer are not essentially different, and may be properly considered together. Counsel for the mining company contends that a lessee may not bind a lessor or fasten a lien upon the latter's property by the purchase of material to be used in working the same under a lease, and cites several cases decided by the supreme court of this state prior to the mechanic's lien act of 1899 (under which this action is brought). Among the cases cited is *Williams v. Eldora Enterprise G. M. Co.*, 35 Colo., 127. This case cites and follows the case of *Wilkins v. Abell*, 26 Colo., 262, wherein the doctrine is laid down that the mere relation of lessee and lessor is not of itself sufficient to bind the interest of the lessor on a contract for work and labor or material furnished for the benefit of the lessee. It is believed that the amendment of the act of 1899 supplies the deficiency of the previous acts, and under the later act a lessor's interest may be bound by a contract with the lessee when the lessor has notice and takes no action to prevent the lien attaching. In other words,

by virtue of the statute of 1899, when a lessor has notice of work being done or material furnished for the benefit of a lessee, which tends to enhance the value of the former's property, he must take steps to prevent a lien from attaching, and, upon a failure to act in the matter, he will be deemed to have assented to the work being done, or the material being furnished, and thereby adopt the act of the lessee as his own, and be estopped subsequently from denying the rights of the lienor under the statute. So far as we are advised, the constitutionality of this provision of the 1899 act has never been passed upon by the courts of review in this state, and inasmuch as this question is not raised or argued in this case, it will not be considered.

The amended complaint under which the cause was tried, and the lien statement, charge, among other things:

"That the said material so described and so furnished to said defendant, The Hillside Mining and Milling Company, a corporation, were consumed by said defendant, The Hillside Mining and Milling Company, a corporation, while working and developing the said property of the Hamlet Lode mining claim above described, and were so used and consumed in the working, preservation, prospecting and developing of said mining claim while the same was yielding precious metals, to-wit, gold and silver, or for the working, prospecting, preservation and development of said lode in search of said metals."

Paragraph 16 of the complaint (which closely follows the lien statement), further alleges that the materials "so furnished as aforesaid were actually furnished and used with the knowledge of the said

Centennial Tunnel and Mining Company * * * and that said defendant corporation * * * actually had notice of the furnishing of all of said goods, wares and merchandise as above set forth, and that the same were used and consumed in the preservation, prospecting, working and developing the premises above described."

The complaint and statement seem to be amply sufficient as to the allegation of notice to the lessor; certainly they are sufficient in this respect as against a general demurrer.

Complaint is next made by the mining company that there is no allegation in the amended complaint that the defendant failed, within five days after it had obtained notice of the furnishing of the material, to give notice that its interest would not be subject to any lien for the same. As we view it, this provision of the statute was enacted for the benefit of the lessor, and constitutes an affirmative defense, which, in order to avail himself of, the lessor must himself plead. This view finds support in the case of *West Coast Lumber Co. v. Newkirk*, 80 Calif., 275; 22 Pac., 231, wherein it is said:

"We do not think it necessary that it should be averred (in the complaint) that the owner of the realty did not give notice that he would not be responsible for the construction of the building. Such notice * * * if given, is a matter of defense to be set up by the defendant."

3. It is further contended that the complaint is fatally defective in that it fails to charge that by the terms of the lease under which, it is alleged, the property was being worked, any improvements or development was required or authorized. The

complaint does charge that the material for which the lien is claimed was furnished to the lessee, and by it used and consumed in the development, prospecting and preservation of the mining property, all with the full knowledge of the owners thereof. This, we think, is sufficient as against a general demurrer, at least. If the defendant company believed that the complaint was ambiguous or indefinite as to the basis of the plaintiff's claim, and it could not determine from the complaint whether plaintiff proposed to rely upon improvements or developments made under the specific terms of a written lease, or made by implied authority from the lessor, a general demurrer was not the proper procedure to reach such supposed defect.

4. We can not assent to the contention made on behalf of the mining company that, by the complaint, appellee was a sub-contractor, and, therefore, shall not consider the authorities cited and the discussion indulged in on that point. In view of the character of the work, which consisted, according to the complaint, in the developing, preserving, prospecting, protecting and working of a mining claim, it was not essential that the complaint should mention or describe the buildings or structures in the erection of which the articles sold were used. If the defendant desired more specific information as to the character of the development or improvements which the merchandise sold by appellant to its lessee had advanced, or to which it had contributed, its remedy was by motion.

5. The lien statement charges that the merchandise for which the lien is claimed was furnished to W. H. Simmons, while he was doing business

under the name of The Hillside Mining and Milling Company, and that the same were furnished at the instance and request of the said W. H. Simmons. The said W. H. Simmons is also described in the lien statement as the lessee of the property, but doing business under the name of The Hillside Mining and Milling Company, but the lien statement contains this further allegation:

“That neither this claimant, The Clark Hardware Company, or its agents or attorney, is able to obtain knowledge or information sufficient on which to base a belief as to whether said Hillside Mining and Milling Company operated under that name as lessee above named by said W. H. Simmons was a corporation sole or aggregate or a partnership so operated by the said W. H. Simmons.”

The original complaint in the county court closely followed the lien statement, and prayed judgment against Simmons. The amended complaint in the district court contains no prayer for judgment against Simmons, but asks for a judgment against the Hillside Mining and Milling Company, and alleges that the same is a corporation. The circumstances of the substitution of the Hillside company in the amended complaint has already been alluded to. Complaint is now made by the defendant, The Centennial Tunnel Mining Company, that there is a variance between the allegations in the lien statement and those contained in the complaint in respect to the party to whom the goods were sold, and who held and operated the lease, and it is contended that by this variance the lien statement names one party as a contractor, while the amended complaint names an entirely different party. We have already

said that we did not regard the plaintiff as a sub-contractor, nor do we regard the lessee as a contractor. It is by treating the lessee as the original contractor that appellee, The Centennial Tunnel Mining Company, reaches the conclusion that the appellant was a sub-contractor. We think no possible harm did or could come to the defendant by this substitution in the amendment of the complaint of The Hillside Company for Simmons, or by the alleged variance. Moreover, we do not discover that any objection was made to the amendment of the complaint, after the case had reached the district court, whereby, upon application of appellant, The Hillside Mining and Milling Company, was made a party under its corporate name, and the complaint was amended apparently without objection, so as to charge that the material was furnished to The Hillside Mining and Milling Company rather than to Simmons, and that said company, rather than Simmons, was the lessee of the mining property, and was actually operating the same. This amendment was made by motion supported by affidavit.

Revised Code, section 82, and section 4036 R. S. of the lien act under which this case was brought, is warrant sufficient for such amendment. See also, *Jones v. Pearl Mining Co.*, 20 Colo., 423; *Western Ry. of Ala. v. Sistunk*, 85 Ala., 352; 5 So. 79; *Anglo Amer. P. & P. Co. v. Turner Co.*, 34 Kans., 340; 8 Pac., 403; *Farris v. Merritt*, 63 Calif., 118.

6. The allegation of the amended complaint as the same affects the time for filing the statement, is:

“That the first of said materials were so furnished to said defendant on the first day of July, 1903, and the last thereof on the 27th day of Oc-

tober, 1904. That on the 23rd day of December, 1904, and within two months of the time when the last of said materials were furnished, said plaintiff filed for record in the office of the county clerk and recorder of said Gilpin county, a lien statement, which is in words and figures as follows, to-wit."

Here setting up the lien statement in full. Thus it is made to appear by the complaint that the lien statement was filed within the time prescribed by section 4033 R. S. We are convinced that the trial court committed error in sustaining the demurrer of The Centennial Tunnel Mining Company.

7. The ruling of the trial court on the demurrer of the defendant, The Hillside Mining and Milling Company, alone, remains for consideration. The sustaining of this demurrer was clearly erroneous, for the reason that this defendant, in its demurrer, nowhere claimed that the complaint did not state facts sufficient to constitute a cause of action against it personally for the amount alleged to be due upon the goods, but only asserted by its demurrer (a) that the amended complaint was insufficient to support a lien (b) that the action was not commenced within the time prescribed by statute (c) that the statement was not filed for record within the proper time; thus it will be seen that the demurrer of this defendant attempted to reach matters limited entirely to the validity of the lien as affecting its property. But if the lien statement be void, for any or all the reasons suggested in the demurrer, still the complaint stated a cause of action against this defendant for the balance due on the store account. The complaint, as to this defendant, The Hillside Mining and Milling Company, was not subject to

demurrer upon any of the seven grounds prescribed by section 56 of the Revised Code, unless possibly the fifth, but the demurrer does not purport to be based upon the ground that several causes of action have been improperly united. If the lien statement was not filed in time, or if the right to foreclose it was barred by the statute when the action was brought, or if the amended complaint was insufficient on its face to entitle the plaintiff to a lien upon the property of this defendant, its rights in this behalf can be amply protected by proper objections when the lien statement is offered in evidence; and there may be other proper methods whereby the defendant can protect its property from the effects of the lien claimed, but the demurrer as filed is wholly insufficient for that purpose, and ought to have been overruled.

For the reasons stated, the judgment of the district court as to The Centennial Tunnel Mining Company and the Hillside Mining and Milling Company is reversed, and the case remanded, with directions to overrule the demurrers of said defendants to the complaint, and for further proceedings in harmony with the views herein expressed.

Reversed With Directions.

[No. 3324.]

KNUDTSON V. PITCHER, Administrator.

An appeal in a case not appealable dismissed without prejudice, neither party, after notice, suggesting any disposition of the cause.

Appeal from San Miguel District Court. HON.
SPRIGG SHACKLEFORD, Judge.

Mr. FRED W. HEATH, for appellant.

Messrs. HOWE & ADAMS, for appellee.

Per Curiam.

This appeal was filed in the supreme court in 1907. An examination discloses that it is not an appealable case and it has been suggested that both appellant and appellee are dead.

Counsel for both, after due notice, have neglected to make suggestion as to further disposition of the case. The appeal is therefore dismissed without prejudice.

Per Curiam.

[No. 3353.]

SEIGLE V. BROMLEY.

1. *PRACTICE—Injunction—Evidence.* Where it is sought to enjoin the establishment and carrying on, in proximity to plaintiff's dwelling, of a business lawful in itself, but which it is alleged will, if carried on in the manner proposed be offensive and injurious to the health of plaintiff's family, it is necessary and proper for the court to hear testimony as to the effect of what is so proposed.

2. *NUISANCE—Nuisance per se.* Where the court upon hearing testimony finds that the business sought to be enjoined is a nuisance, such as should be enjoined, the question of nuisance *per se* is not presented.

3. — *Public—Private—Remedies.* The keeping of swine is in itself a lawful business, but to maintain a place where hogs are fed upon offensive garbage, and which is conducted in such manner as not only to be offensive, but to probably occasion disease, is both a public and private nuisance, and may be proceeded

against by indictment, or one sustaining a special injury may have an injunction, or an action for damages.

4. *INJUNCTION—Anticipated Injuries.* An injunction may be awarded to prevent the creation of a nuisance, as well as to suppress one already in being; but in such case the bill must set forth both the character of the nuisance and the character of the injury which it is claimed will result therefrom. And the case must be a clear one; though absolute certainty that the anticipated injury will result is not required.

Appeal from Adams District Court. HON. HARRY P. GAMBLE, Judge.

Mr. R. D. REES, for appellant.

No appearance for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

This was a suit by the appellee to enjoin the appellant from establishing and maintaining a hog ranch, wherein garbage and offal was alleged to be used as feed for the swine.

The plaintiff owned a farm of forty acres upon which he had lived with his family for about twenty-five years. The defendant had purchased land adjoining that of the plaintiff and was about to establish a hog ranch thereon, the pens having been constructed near plaintiff's dwelling, for that purpose, but at the time of the suit the business was not as yet established on the particular premises, but defendant was conducting a hog ranch at another place, and had so conducted it for several years.

It was alleged in the complaint that the defendant proposed to establish upon the premises adjoining that of the plaintiff, such a business as was filthy, detrimental to health, offensive to the senses

and such as would depreciate the value of the property of the plaintiff and render his dwelling uninhabitable. That it was the custom of defendant to feed his swine garbage, offal and filth hauled from the city of Denver, and that such feeding created a nauseating and offensive odor detrimental to health, and a continuing nuisance. That the defendant further proposed to feed his swine dead animals and other noisome and unhealthy substances, from which the feeding swine frequently die, and the dead carcasses are left to lie on the ground and decay. It was further alleged that the business so sought to be maintained by the defendant, is so unwholesome, so injurious to health, and so detrimental to the comfort and safety to himself and family, and the public at large, that plaintiff can recover no adequate compensation, and has no adequate remedy at law. Further, that defendant had not procured a license from the county board of health as is required by law.

The answer admitted the purpose of the defendant to establish and maintain a hog ranch, but denied that his business as then conducted, or intended to be conducted on the premises in question, is unwholesome, injurious to health, or detrimental to plaintiff or the public, and denied that the business of maintaining a hog ranch is universally recognized as unwholesome or offensive if properly maintained.

The defendant admitted that he had no license from the county board, but declared that he had an application for such license pending.

He further alleged that he had invested twenty thousand dollars in the purchase of the premises

and that the same was of but little value for any other purpose. The order of the court was that the defendant and those acting by, through and under him, be forever restrained and enjoined from operating, maintaining or attempting to operate or maintain, a hog ranch for the feeding of garbage and offal to swine, upon the premises involved, in such manner as will be offensive to the plaintiff.

From this judgment the defendant appealed, but the appellee has not filed a brief in the case, or in any wise attempted to assist this court in a determination of the matter here.

The errors complained of are (a) the admission of testimony concerning conditions upon other hog ranches in the vicinity where garbage and offal were fed to swine and the effect and results thereof. (b) That inasmuch as the proposed offensive business was not then in actual operation the defendant cannot be enjoined from putting it into operation.

The defendant testified that he proposed to sterilize the garbage, but that although he had fed garbage and meat for some years, from the city, and from slaughter houses, he had not sterilized the same, and was not quite clear as to what the process was or should be. The court refers to this testimony in the following excerpt from his findings:

“There is no doubt, in the court’s mind, that this community, in which the hog ranch is contemplated is a farming community, and is outside of the district known as the ‘hog ranch district.’ There is no doubt in the court’s mind, either, that the feeding of garbage to hogs, as alleged in the complaint

will constitute a nuisance, and such a nuisance as this court should enjoin. I am inclined to believe from the evidence of the defendant himself that when he bought this place and started in to improve it with the idea of conducting a hog ranch there, he had no intention of sterilizing, or conducting his hog ranch, in any manner different from the conduct of the previous place that he had operated, and is now operating. I think, perhaps it is true that when he found there was some objection, that he was satisfied to try the other method, with the idea, perhaps, of making a lesser nuisance, and do away with the disagreeable features. It is on this point of the case that I am in doubt—as to whether such treatment, as the defendant has said he proposes to use, will actually do away with the objectionable features of the hog ranch.

I am of the opinion that the defendant should be restrained and enjoined from conducting this ranch unless he so treats his garbage that none of the disagreeable odors and features of feeding garbage will be experienced by the plaintiff; and an injunction will issue so restraining him."

The gravamen of the offense charged was not in the keeping and maintaining of a hog ranch, for the raising of hogs may be said to be both necessary and lawful, but in the proposal to keep and maintain a place where the swine were to be fed garbage, offal and dead animals, alleged to be offensive, unhealthy and dangerous.

It was necessary, therefore, for the court to hear testimony concerning the nature and character of such feed, as well as the resulting effects when fed to swine, upon a ranch of the kind so pro-

posed to be established, in order to determine the very question at issue in the case. The court did not err in this particular.

The testimony discloses a condition in this regard so repulsive and so inimical to the public health as to prompt the inquiry, as to how in a civilized community, such things are permitted to exist and why the offenders are not both restrained and criminally prosecuted.

It would seem to be a fruitful field for health boards and prosecuting officers.

The garbage so fed, and as complained of here, is described by witnesses, as filth of the most offensive kind. "Rotten refuse, put out in garbage cans, rotten meat, offal from the slaughter houses and stuff from hospitals, rags and poultices. Many of the hogs so fed die from disease. I have seen them lie on the ground and other pigs feed upon their dead bodies. This is the condition at the place where defendant is now conducting his business. Other hog ranches are similar."

Witness Alexander, a physician, had visited several of these hog ranches where garbage was fed, and found garbage to consist of table scraps, more or less offal, intestines, livers, and some dead calves, meat with maggots in it, etc. Can see where disease may be contracted from such garbage, such as typhus and typhoid fever, scarlet fever, probably malaria fever. It may be carried from these places by the house fly. The place of defendant was in this condition and he had about five hundred hogs.

Witness Campbell testified that at defendant's present ranch, he saw conditions as above described, counted eleven dead calves, partly eaten, paunches

of cows, and entrails. Had seen these hog ranches when the ground was alive with maggots so that it seemed almost to move. The odor was offensive at a distance of half a mile. Many other witnesses testified to the same effect as those referred to.

It will be observed that the defendant was not restrained from maintaining a hog ranch, but rather from feeding garbage, offal and other substances, which produce the condition as appears from the testimony in the case.

Then may the court enjoin the establishment and maintenance of such a place when he believes from the evidence that such is the purpose, though where a plan of sterilization is proposed, but which the court is not satisfied will prevent the evil effects.

It will be observed that the court judicially determined upon a hearing, that the kind of business enjoined, that is to say the feeding of garbage and offal to hogs in the manner complained of was a nuisance, and such a nuisance as should be enjoined and therefore the question presented by counsel as to whether or not it is a nuisance *per se*, is not involved.

A nuisance may be at the same time both a public and private nuisance, and the case at bar is a very clear example. Such a nuisance may be proceeded against either by indictment or by the individual specially annoyed, by injunction or in an action for damage. *City of Denver v. Mullen et al.*, 7 Colo., 345.

But counsel contend that inasmuch as the nuisance in this case was not in actual existence, but at

most only contemplated and threatened, the court erred in granting the injunction.

Counsel cites many cases in support of the general rule laid down in 14 Enc. P. & P., 1128.

“That where the thing complained of is not a nuisance *per se*, but may or may not become so according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance; and so, where a building in course of erection, or about to be erected, will not of itself constitute a nuisance, equity will not enjoin it on the ground that it may be used for a purpose which will make it a nuisance. If the building is in fact used in such a manner as to create a nuisance, its use for such purpose will then be enjoined.”

But in the same work and as a qualification of the doctrine there stated, it is said:

“However, an equity court may in proper cases grant preventative as well as remedial relief, and where a threatened act must, from its character, necessarily result in a nuisance, equity will interfere by injunction.”

This rule is supported by Mr. Wood in his work on the Law of Nuisances, sec. 788, where it is said:

“An injunction will be issued to prevent the creation of a nuisance, as well as to stop a nuisance already created, but in such case the character of the nuisance must be particularly set forth in the bill, as well as the character of the injury that will result therefrom.”

These requirements seem to have been fully met both in the allegations and in the proof in this case, and there can be no doubt as to the injurious results of the threatened nuisance. In considering this subject the supreme court of Indiana said:

"In a proper case an injunction will lie to prevent the use of property for operating a business which is a nuisance *per se*, and even to be used for a business not a nuisance *per se*, if threatened and intended to be conducted in an improper manner, so as to constitute a nuisance. An injunction will lie to prevent a nuisance threatened and in progress, as well as to abate one already in existence." 117 Ind., 260, 261.

Wahle v. Reinback, 76 Ill., 322, was an action to enjoin the erection of a privy upon adjoining premises and the court there said:

"Manifestly no remedy in an action at law would be adequate in a case like the present. Upon what basis could the damages be estimated for the sickness or discomfort caused by inhaling the unwholesome vapors, drinking the impure water, and enduring the foul stenches originating from a structure of the description and relative location complained of? And to say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be but little better than a mockery of justice to him whose residence is affected by it. We are of the opinion that the case is clearly one in which there is no adequate remedy at law, and where the injury is, in its nature, irreparable."

The case of *Cleveland v. Citizens Gas Co.*, 20 N. J. Eq., 201, was a case similar in many respects

to the one at bar so far as the principles involved are concerned, and in that case the injunction granted was likewise limited to injurious process that might be used. That was an action to restrain the erection of a gas plant in the neighborhood of certain dwelling houses.

The bill alleged "That the building and working of the gas works so near their houses, will greatly injure their value, and render them unfit for residences. That gas works always and necessarily send forth noisome and unpleasant vapors and smoke which are diffused to an extent greater than the distance to these houses, which will render living in them uncomfortable and unhealthy."

The answer was of similar import in that case to the one at bar, in that it denied that under the process proposed to be used the odor would be offensive or injurious. Specifically the answer recited:

"The defendants deny that the manufacture of gas in the manner in which they intend to conduct it, will be a nuisance to the complainants' houses, or will render life in them uncomfortable. They answer that they do not intend to use the process of purifying the gas with lime, which is the cause of the most objectionable odor arising from gas works, and will substitute for it the process by oxide of iron, which is comparatively inoffensive. They also intend to construct a cistern under ground, into which the tar and ammoniacal liquors and other offensive fluid products, will be conveyed by gas tight pipes, and from which they will be discharged by pipes into boats, which will convey them away."

The court expressed some doubt in that case

as in the one at bar, as to whether or not the proposed process would remedy the evil, but while declining to enjoin the erection of the plant and warning the defendant as to the risk it took in this erection of the plant, should it prove to be offensive as was contended in the complaint ruled:

“An injunction must issue to restrain the defendant, the gas company, from using what is known as the lime process in purifying their gas, or any process of which lime is a substantial part; and from manufacturing gas in any way that will produce any annoyance to persons dwelling in the houses of the complainants, by any smoke, gases, other effluvia or odors, that may issue from the works. The residue of the injunction is refused.”

This is about what the court did in the case at bar and finds an apparently sound precedent in the case just cited.

The right to enjoin a threatened nuisance seem to be well stated in *Miley v. A'Hearn* (Ky.), 18 S. W., 530, where it is said:

“A party is not required, however, to wait until the injury is inflicted. The object of the writ is preventive. Like the interdict of the civil law, it wards off the injury. It is true, it cannot be called into exercise unless the right of the party invoking it be certain, and a necessity exists for its aid. In other words, the case must be a clear one. But this does not mean that there must be an absolute certainty of its need. If so, it could rarely be invoked. It is true, the party cannot act upon a mere fear or apprehension, a mere possibility or theoretical injury; but, if the danger be probable and threatening he may invoke its aid, and need not delay until

the injury is actually inflicted. If this were required, the effectiveness of the writ would be destroyed. There must be good ground to apprehend injury of such a character that, if it be inflicted, adequate compensation will be impossible. The writ must be applied with care; but, if the danger be threatening, and likely to ensue, as it seems to us is the case here, it may properly be resorted to, and without it equity would in large measure be without the power to perform its office."

Under the circumstances of this case where the injury threatened was of so grave a character as to destroy the comfort and endanger the health of the plaintiff's family, as well as of the community, we feel that the court was fully justified in entering the order made. Particularly where it appears that the defendant was at the time, and had been for years, prior thereto, maintaining the very character of nuisance complained of and in the same vicinity.

The order of the court should be modified in that the language "In such manner as will be offensive to the plaintiff" should be changed to the words "in such manner as will not be offensive or dangerous to the health of the plaintiff and the public."

The determination of this question should not be left to the plaintiff alone.

With instructions to so modify the order, the judgment is affirmed.

All the judges concurring.

[No. 3385.]

COLORADO SPRINGS RAPID TRANSIT RAILWAY CO. ET
AL. V. ALBRECHT.

1. **DAMAGES—Evidence as to.** In an action for the negligent obstruction of a water course, causing the accumulation of waters, flooding and devastating plaintiff's premises, it is proper to receive evidence as to the cost of removing sand washed upon the premises, replacing and repairing buildings and bridges, as to the value of trees uprooted, and outbuildings and beds of asparagus and strawberries swept away, as tending to show the difference in value of the land before and after the injury.

2. — **Duty of Court to Instruct as to Elements.** In an action for a tort the court should, of its own motion, instruct the jury as to the elements of damage, the basis on which the assessment should be made, and within what limits the damages may be estimated. It is error to leave the jury to make an award based on conjecture and belief, without reference to legal rules determining the limits of compensation.

3. **INSTRUCTIONS—Non-Direction.** Where throughout the trial the defendant insists, in vain, upon the true rule of damages, he will not be regarded as waiving his right to a suitable instruction upon the question, by merely failing to expressly request it.

4. — **Misleading.** Where there is no instruction as to the elements of damage, and the court during the progress of the trial has made frequent and diverse rulings as to the admissibility of testimony, a direction to the jury not to consider "any remark, decision or order made during the trial" serves to accentuate the improper freedom allowed the jury to enter into the field of conjecture, and is error.

5. **PLEADINGS—Verification.** The provisions of the code (Rev. Code, sec. 67), requiring that when a pleading is verified by some one other than the party the affidavit must state the reason why the verification is not made by the party himself, is mandatory. A reply verified by the attorney of the plaintiff without any showing why the verification is not made by the plaintiff, should be stricken from the files.

6. **CORPORATION—Successor to Another—Liability for Such Predecessor.** That a corporation is formed with the purpose, among other things, to take over the properties of another and conduct the same business or enterprise, and that it does actually acquire all the properties of such former corporation is not, of itself,

sufficient to charge it with liability for its torts. Where there is no consolidation under the statute, it must appear that there was an express assumption of such liabilities, or an intention to discharge them, or that the transfer was done in fraud, either actual or constructive, as to the creditors of the original corporation.

Appeal from El Paso District Court. HON. W. S. MORRIS, Judge.

MR. DAVID P. STRICKLER, MR. J. A. RITTER, for appellants.

MESSRS. ORR & CUNNINGHAM, MR. H. M. MASON, for appellee.

Judgment reversed.

KING, J., delivered the opinion of the court.

CUNNINGHAM, J., not participating.

This action was brought by appellee against The Colorado Springs Rapid Transit Railway Company, and The Colorado Springs and Interurban Railway Company, corporations, as defendants, to recover damages in the sum of \$3,500 alleged to have been sustained by plaintiff through the negligence of The Colorado Springs Rapid Transit Railway Company in building and maintaining a stone wall in the bed of a stream, on and along the boundary of plaintiff's land, in such condition that it became undermined by, and falling into the stream, caused the water to overflow upon and flood the land of plaintiff.

The complaint charged that the flood water swept over plaintiff's premises with such velocity and force that his dwelling was torn from its foundation and its walls damaged; that the land was

washed away to such an extent that growing fruit trees were uprooted, and shrubs, asparagus and strawberry beds were entirely carried away and destroyed, as well as the stone abutments of a foot-bridge, the foot-bridge itself and certain outbuildings, and some personal property; that immense deposits of sand and rubbish were left upon and covering the premises, besides other permanent injury not necessary to mention.

Defendants denied the allegations of negligence, and, as an affirmative defense, alleged that the injury to plaintiff's premises, as well as the destruction of the stone wall belonging to the said Rapid Transit Company, was caused by an unprecedented flood, a cloud-burst of unusual size and devastating character, unforeseen and unforeseeable by defendant; in other words, an act of God.

The jury returned a verdict for plaintiff against both defendants, upon which judgment was rendered by the court, and from which defendants appealed.

The only assignments of errors necessary to be considered are those relating to the proof of damage to plaintiff's land, and the failure of the court to give any instruction as to the measure of damage. The only instruction given on the question of damage, or to guide the jury in determining the amount thereof, was, that if they found for the plaintiff they should give him "such amount as you may find from the evidence he is entitled to recover, not exceeding the sum of \$3,500." No testimony was offered as to the value of the land either before or after the injury. The plaintiff, in order to establish his damage to the freehold, testified as to the cost of re-

moving the sand, replacing the house on its foundation and repairing it, replacing the abutments of the foot-bridge, and as to his estimate of the value of the growing fruit trees, and of the beds of asparagus and strawberries, and the value of the out-buildings. This testimony and these estimates of values were, we think, admissible as elements tending to show the difference in value of the land before and after the flood, but it is settled in this state that the amount of the damage to real estate, under circumstances as shown in this case, cannot be fixed and determined by such method without reference to the value of the land before and after the injury complained of, and that the jury must be so instructed. The rule governing the duty of the court in instructing the jury, and as to the method of proving the amount of damages, is declared by the supreme court of this state in the case of *Mustang Reservoir etc. Co. v. Hissman*, 49 Colo., 308, and as the facts (except as to certain personal property) are strikingly similar, indeed, almost identical with those of the case now under consideration, we shall quote from the opinion of Mr. Justice Bailey in the case cited: "It is settled doctrine everywhere that: 'The rules by which damages are to be estimated should be laid down by the court, and it is its duty to explain to the jury the basis on which the assessment should be made, the proper elements of the damage involved, and within what limits they may be estimated in the case involved. The jury should not be left to determine the amount from conjecture and belief without reference to the legal rules determining the bounds and limits of compensation.'—13 Cyc. Law & Proceed-

ure, p. 236. This is a rule of general practice. The court, on its own motion, should have instructed on this point."

The case cited is also directly in point, and controlling, on the method of proof of damages to the freehold, and amply supported by the authorities therein collected. The necessity for a definite instruction, as hereinbefore set forth, is made evident and emphatic by a reading of the bill of exceptions in this case. Much of the time during the introduction of testimony the learned judge who presided at the trial was in doubt as to the proper rule for the measure of damages, and yet the jury was left wholly without a guide upon that subject and to ascertain the amount from "conjecture and belief without reference to legal rules determining the bounds, and limits of compensation." The instruction as given was not only subject to objection for non-direction in the matter mentioned, but it contained serious if not fatal misdirection in that it permitted a verdict in any sum not to exceed \$3,500, whereas, there was no evidence to authorize a verdict in excess of about \$1,200, under any view of the case, unless from mere conjecture as to permanent and continuing injury as alleged in the complaint. This court cannot say that such instruction was not prejudicial. In view of the record which shows that counsel for appellants, throughout the trial, insisted, but without avail, upon a ruling from the court that the measure of damage to the freehold must be the difference in the value of the land before and after the flood, appellants will not be held to have waived their right to a suitable instruction by failing to specifically request or tender it.

We might decline to discuss further assignments, but in view of another trial, the following observations are for guidance of court and counsel:

(1) Motion was made to strike the separate replications for the reason that they were verified by plaintiff's attorney and the affidavit failed to state the "reasons why it was not made by one of the parties," as required by the code. This provision of the code is mandatory. It is possible that counsel contended and the court held that the affidavit in substance was that "the facts were within the knowledge of the attorney verifying the same." It requires a very liberal construction of the language used to so hold. It is rather an allegation that the attorney was familiar with the pleading than that the facts were within his knowledge. Besides, if made because the facts were within his knowledge, the verification should have been substantially in the form required by the code when made by a party to the suit, instead of in the form prescribed as permissible where made by an agent or attorney for a corporation. The motion to strike should have been sustained.

(2) The seventh instruction, to the effect that in case the jury should find from the evidence that The Colorado Springs and Interurban Railway Company was organized and incorporated for the purpose and with the intention, among other things, of acquiring the property, and thereafter to carry on the business and affairs of The Colorado Springs Rapid Transit Railway Company, in its place and stead, the verdict should be against both defendants in case it was in favor of plaintiff, is assigned as error. The Interurban company was not charged with

the negligence complained of. The complaint alleged that said company was organized and incorporated in succession to its co-defendant, and, among other things, for the purpose of acquiring its property and to assume its liabilities and obligations; that thereafter it did purchase and take over all the property of its co-defendant, and that "*by reason thereof*, it did assume all obligations and liabilities then existing" against said co-defendant. The cause was tried upon the theory that because all the property of the selling company was transferred to the purchasing company, therefore and thereby, the latter company actually or impliedly assumed all the obligations and liabilities of the other. We will quote from counsel's brief a statement of their theory: "Plaintiff therefore proceeded against the new company upon the theory of implied assumption of the liability of the old company toward him." The allegations of the complaint and the evidence in support thereof were not sufficient to sustain a judgment against The Colorado Springs and Interurban Railway Company, based upon an assumpsit, actual or implied. There is no allegation or proof that the purchasing company expressly agreed to pay or assume the obligations, nor evidence of intention to pay the claim sued upon, but any such intention was expressly denied; nor that the new corporation was merely the old one under a new name. It was alleged and shown that the new company was incorporated for the purpose of not only taking over the property of its co-defendant, but for other purposes, among which was the purchase of the property of another and similar railway company, which it did purchase and take over. There was no consolida-

tion under the statute imposing liability. The rule is as stated in 2 Clark & Marshall on Private Corporations, section 342 (h), that, in order that a promise may be implied on the part of a corporation to pay the debts of another corporation, to the property and franchises of which it has succeeded by valid purchase, the conduct relied upon must show such an intention. The instruction was, in effect, an instructed verdict against the defendant, the Interurban company, in case the jury's finding should be against its co-defendant, and was clearly erroneous if based upon plaintiff's theory of implied assumpsit.—*Austin v. Tecumseh National Bank*, 49 Neb., 412; 59 Am. St. Rep., 543, and cases cited. *Pennison v. Chicago etc. Ry. Co.* (Wis.), 67 N. W., 702. *Tawas etc. Railroad Co. v. Judge*, 44 Mich., 479. If any ground of liability is alleged or disclosed, it is that of fraud, actual or constructive, by which, in respect to the property, the purchasing company may be held liable in equity to creditors of the old corporation if fraud is shown in the transfer.—*Armour v. E. Bement's Sons*, 123 Fed., 56. But upon that we express no opinion, lest it might anticipate or embarrass further proceedings in case of a new trial. The cases cited by counsel for appellee in support of liability by implied assumption, apply rather to cases of constructive fraud, or of consolidation or merger, covered by statute, as admitted by them in their written briefs.

(3) The eleventh instruction charged the jury that "no remark, decision or order made by the court during the progress of the trial" was to be considered by them. In view of the frequent and diverse rulings of the court on the admission of

testimony, and the omission of necessary instructions as to the rule for the measure of damages, this instruction is clearly erroneous, and serves to accentuate the freedom with which the jury were allowed to enter into the field of conjecture and belief, without reference to legal rules, condemned by the court in *Mustang Reservoir etc. Co. v. Hissman, supra*.

The cause is reversed and remanded for further proceedings in accordance with the views herein expressed.

[No. 3386.]

WESTERN LUMBER AND POLE CO. V. CITY OF GOLDEN.

1. COURT OF APPEALS—*Jurisdiction*. This court has the same jurisdiction to entertain and determine, as a writ of error, an appeal, in a non-appealable case, which before the organization of this court was vested in the Supreme Court by sec. 423 of the Revised Code of 1908.

Hurlbut, J., dissents.

2. APPEAL WHERE NO APPEAL LIES—*Entry as Writ of Error—Limitation—General Appearance—Effect*. By general appearance in an appeal, and joining issue on the merits even after the lapse of the three years allowed by the statute (Mills' Code, sec. 401, Rev. Code 1908, sec. 436), within which to sue out a writ of error the appellee waives the statutory limitation. Where application is made to enter the cause as a writ of error, appellee will not be heard to urge the lapse of the statutory appeal.

3. STATUTES—*Construction*. In the interpretation of a statute the legislative purpose and the objects sought to be accomplished by the enactment are to be always borne in mind. And it is not to be admitted that an unjust or unnatural consequence was contemplated by the legislature, unless this intention is too plain to admit of a doubt.

And the court should not adopt an interpretation which produces absurd, unreasonable, unjust, or oppressive results, if such interpretation can be avoided.

Appeal from Jefferson District Court. HON. FLOR
ASHBAUGH, Judge.

MESSRS. VAN CISE, GRANT & VAN CISE, for ap-
pellant.

MR. WILLIAM A. DIER, MR. J. W. BARNES, for
appellee.

CUNNINGHAM, Judge.

Appellee has filed its motion to dismiss the ap-
peal taken in this case, and in the same motion ques-
tions the authority of this court to re-enter the case
as pending on error.

Appellant does not insist that its appeal can
be maintained, and since it is from a judgment of
dismissal, and does not relate to a franchise or free-
hold, it is clear that the appeal must be dismissed.
But it is urged, on behalf of appellant, that the case
should be re-entered and reviewed as pending on
error.

The judgment from which the appeal was taken
was rendered May 9, 1908. The motion to dismiss
the appeal now under consideration was filed Feb-
ruary 7, 1912—more than three years after the date
of the judgment. Prior to filing its motion to dis-
miss, but more than three years subsequent to the
date of the judgment, appellee entered a general ap-
pearance in the supreme court, where the case was
then pending, and by filing its answer brief, joined
issue upon the merits.

1. Before approaching the question of the au-
thority of this court to re-enter any case on error,
following its dismissal on appeal, we will first dis-
pose of appellee's contention that the cause cannot

be re-entered on error, in any event, for the reason that its appearance was not entered until after the time for suing out a writ of error, under the three-year statute of limitations had expired. By entering a general appearance and joining issue upon the merits, though after the expiration of the three-year period in which a writ of error might have been sued out, appellee waived its right to invoke the statute of limitations. *Haley v. Elliott*, 20 Colo., 199.

2. Whether this court has authority, upon dismissing an appeal, where it appears that the court would have jurisdiction if the action had reached it on writ of error, to order the clerk to enter the action as pending on writ of error, and thereafter review and determine the cause, has been vigorously debated in briefs and on oral argument, in this and other cases pending before this court wherein similar contentions are made. This question has not, as yet, been squarely determined by us, and since our decision of this motion must affect many other cases, and unless reversed or modified, become and remain a rule of practice, we fully appreciate the gravity of the contention and the importance of a correct disposition of it.

It is true that the jurisdiction of this court is derivative in character, depending upon the proper interpretation of the statute creating it, and certain other statutes *in pari materia*.

The ordinary rules of statutory construction must be applied to the act from whence our jurisdiction springs. By an unbroken line of decisions our supreme court and the former court of appeals, as well as the courts of the land generally, have

held that in the interpretation of a statute the legislative purposes and objects are always to be borne in mind, and an indispensable requisite is to first inquire what objects and purposes were sought to be accomplished by it. The objects and purposes of the statute creating this court have been happily stated by Mr. Justice Musser, who wrote the majority opinion in the case of *People v. Scott* (Colo.), 120 Pac., 126. In discussing said statute in the *Scott* case, it was said:

“The docket of this court, the supreme court, was congested to such an extent that the delay incident to such a condition was regarded and felt by many to be a denial of the right guaranteed by our constitution to a remedy for every legal injury, and to enjoy that remedy without delay. It was to relieve this serious condition, and to afford that speedy determination of causes assured by the constitution that the new court was created. * * * So that beyond question the paramount object of this act was to relieve this serious situation and to immediately begin the work of such relief.”

To hold, in this and similar cases, that no authority is vested in this court to re-enter the same as pending on error, would indeed be a speedy determination of such causes, but it seems reasonably probable that the remedy would not be enjoyed by those who lost their right to have their causes reviewed, as they might have been reviewed, by the supreme court, but for the legislative enactment creating this court. In *Colorado I. W. v. Sierra Grand M. Co.*, 15 Colo., 499, it is said:

“A proper regard to the administration of justice, the interests of trade and commerce, and to the

rights of citizens, requires that the jurisdiction of courts be sustained and not circumscribed, except by the necessity of law."

We think no one will contend that it was within the intention of the legislature by the creation of this court to deny to certain litigants rights or privileges which they, at that time enjoyed; that is to say, it was not supposed by the legislature that it was adopting an act that would summarily dispose of, without review or consideration, a class of cases transferred by the supreme court to this court, when, had those cases been permitted to remain in the supreme court, a review was made mandatory by the provisions of the code. To place this interpretation on the act of 1911 would be to impute to the legislature an unworthy motive. In *Bradley v. People*, 8 Colo., 603, it is said that:

"Unless the intention is too palpable to admit of doubt, duty and respect to the legislative body require that the judiciary should not adjudge unnatural or unjust consequences as within the contemplation of the law."

Nor should a construction of a statute be adopted which produces unreasonable, absurd, unjust or oppressive results, if such interpretation may be avoided.

People v. DeGuelle, 47 Colo., 18; *Wike v. Campbell*, 5 Colo., 131.

Sec. 423 Civil Code (R. S.) reads as follows:

"Whenever the supreme court or court of appeals shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appearing that the court would have jurisdiction if the action had come up on writ of error, the court shall order the

clerk, without additional fees, to enter the action as pending on writ of error, and thereupon all the proceedings shall be such as if the action had originally been brought to the court on writ of error; and in such case the court may, upon proper showing, order a supersedeas bond to be filed in place of the appeal bond."

(It is conceded that the court of appeals referred to in the above section was the old court of appeals, and no contention has been made, nor is it our understanding, that this court is a continuation of the former court of appeals.)

Sec. 423 Civil Code (R. S.) is generally understood by the profession to be a part of our Code of Civil Procedure, and while there is no express provision in the act creating the court of appeals that the code shall govern it, the decision in *Long v. Sullivan*, 21 Colo., 109, is authority, if any were required, for holding that the Code constitutes our chart in matters of practice and procedure; indeed, only by invoking the provisions of the preceding section—422—and holding the code to be our source of authority in such matters, are we authorized to entertain or grant appellee's motion to dismiss this appeal. We are quite unable to perceive either justice or logic in the contention that sec. 422 constitutes a refuge for appellee, while sec. 423 is not available to appellant; and beyond our jurisdiction to apply.

If this case had been pending on error in the supreme court at the time that court transferred it to the docket of this court, there can be no question, under such circumstances, of the jurisdiction of this court over the cause (subject, of course, to the right

to have the same remanded under the provision of the act). The mere fact that the action chanced to be pending (in the supreme court) on appeal which had been improvidently prayed, allowed and perfected, cannot, we believe, affect our jurisdiction in the premises. In *Bowling v. Chambers*, 20 Colo. App., 117, referring to Sec. 388A M. A. Code—being sec. 423 R. S., it is said:

“The jurisdiction of this court to entertain this matter if it had come up on writ of error must be conceded, and we think that the case falls within the mandate of the above quoted section of the code.”

We think it is no answer to this argument to say that the old court of appeals that decided the *Bowling* case was given jurisdiction to issue writs of error to lower courts, and that it had jurisdiction generally to hear and determine causes coming directly to it from the lower courts on error. Jurisdiction in this behalf was no more clearly bestowed upon it than is jurisdiction bestowed upon this court to hear and determine error cases transferred to it by and from the supreme court. In other words, the distinction seems to be purely adverbial, or one of direction, that is to say, the *Bowling* opinion refers to cases which came *up* to it, the old court of appeals, on writ of error, while the error cases which this court is given jurisdiction to hear and determine, came *over* to it, but it is not believed that the manner of acquiring jurisdiction is controlling.

In the *Long* case, the supreme court held a certain section of our code, namely, sec. 397, was applicable to the former court of appeals, notwithstanding the act creating that court did not, in terms,

attempt to make the section applicable to cases appealed to that court. In the course of its opinion in the *Long* case, the court used this language:

"This act (meaning the act creating the former court of appeals) was passed for the purpose of relieving the over-burdened docket of this court." (Meaning the supreme court.)

After referring to the various sections of the old court of appeals act, many of which are strikingly similar to the sections of the act creating the present court of appeals, the supreme court, in the *Long* case, says:

"These sections of the act show beyond controversy that it was the intention of the legislature to provide a practice for the court of appeals similar to the practice in the supreme court. This conclusion also finds support in those provisions of the act which allow certain cases to be transferred from the supreme court to the court of appeals. This transfer of cases from one court to the other presents, of itself, a strong argument in favor of the uniformity of practice contended for by appellee.

Next the supreme court, in the *Long* case, takes up section 24 of article V. of the state constitution, which reads as follows:

"Sec. 24. No law shall be revised or amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revised, amended, extended or conferred shall be re-enacted and republished at length."

The supreme court reached the conclusion that its holding was not in violation of this section of the constitution, saying on this subject:

"If appellant's contention be sustained, then

every time a new court is created, the entire code must of necessity be re-enacted to make it operative on such court, and our already cumbersome statutes would be increased in volume until it would be difficult to ascertain the law upon a given subject."

It is further suggested in the *Long* case that the subject was not one of first impression, but had been determined in *Denver Circle R. Co. v. Nestor*, 10 Colo., 403.

It must be assumed that the legislature, in passing the last court of appeals act, had in mind the decision of the supreme court in the case of *Long v. Sullivan*, and therefore, indulged the warrantable conclusion that it was not necessary to incorporate into the act a section which, in so many words, specifically conferred upon this court the right to re-enter a cause as pending on error, when, for any reason, the appeal taken in such cause had been dismissed for want of jurisdiction in the court to hear and determine the same upon appeal. The intention of the legislature to confer upon this court such authority is further manifested in sec. 7 of the act, which specifically provides that the court which it was creating should be governed in matters of practice and procedure by the same rules and regulations governing the supreme court, in so far as the same were practicable or applicable.

But, as we view the act, we are not driven to any doubtful statutory construction in order to sustain our jurisdiction to re-enter this cause as pending on error. Section 3 of the act, as we read it, clearly confers such jurisdiction. Sec. 3 of the act reads as follows:

“Said court of appeals shall have jurisdiction to review and determine all judgments in civil causes now pending upon the docket of the supreme court, or wherein appeals were perfected prior to the taking effect of this act, or that may hereafter and during the life of the court of appeals be taken to the supreme court for review, save and except writs of error to county courts.”

There can be no question that the judgment before us was rendered in a civil cause; that it was pending upon the docket of the supreme court is admitted, and it was not pending upon a writ of error to a county court. If the English language means anything, then this section conferred upon this court power to *review and determine* this judgment. Sec. 3, therefore, clearly vests this court with initial jurisdiction; and the act does not limit or prescribe the method which we shall pursue in reviewing and determining the cause, except that our procedure shall be, in so far as practicable, similar to that of the supreme court. Sec. 7 provides in part that:

“The court of appeals shall have the power to adopt rules regulating the procedure therein, in the same manner and with like effect as the supreme court; provided that such procedure shall be, so far as practicable, similar to that of the supreme court. It shall be a court of record and have a seal, and shall also have power to issue *all necessary and proper writs and process in aid of its jurisdiction in the same manner and with the same effect as the supreme court.*”

Sec. 4 of the act provides that all appeals pending in the supreme court, and all appeals that had

been perfected but not docketed in that court, should, upon the taking effect of the act creating this court, be transferred by order of the supreme court to the docket of this court "*for hearing and determination.*"

Thus, it appears plainly from the wording of the act creating this court, that the legislative intent was that this court should "hear and determine," as expressed in sec. 4, and "review and determine" as expressed in sec. 3, all cases transferred by the supreme court to the docket of this court (unless the same were remanded to the supreme court). Therefore, it would seem that the jurisdiction confessedly vested at one time in the supreme court to review this cause, has not been dissipated and altogether lost by virtue of the transfer of the case under the mandate of the statute to this court; and since, as we read the statute, it confers upon us the authority and duty to re-enter this cause as pending on error, the order will be that the motion to dismiss the appeal be granted, the appeal dismissed, and the cause re-entered as pending on error.

Appeal dismissed, and cause re-entered as pending on error.

HURLBUT, Judge, dissents from so much of the opinion as pertains to the right of this court to re-enter the case as pending on error.

HURLBUT, J., dissenting.

In interpreting the law concerning the power of this court to order a cause, pending on appeal, to be entered as pending on error following dismissal of the appeal, I have reached an opposite conclusion to that expressed in the court's opinion.

It is not my purpose to do more than give my reasons, as briefly as possible, for holding contrary views to those entertained by my brother associates.

The question mooted is one of jurisdiction, and inasmuch as this tribunal is one of legislative creation, its jurisdiction, powers and duties, must be ascertained from the act that gave it existence, and such other legislative enactments as may be deemed clearly applicable thereto.

A portion of section one of the act creating this court reads as follows:

"That there be and is hereby established a court to be known as the 'court of appeals,' which shall exist for a period of four years from the date upon which this act shall take effect and shall exercise only such jurisdiction as is hereinafter conferred upon it," etc.

The phrase here found, "and shall exercise only such jurisdiction as is hereinafter conferred upon it," is plain and free from ambiguity, and is indicative of a legislative intent that the court shall have no implied powers and possess no jurisdiction other than that conferred by the act itself. Its every judicial act when challenged must find justification within the letter and spirit of the act.

Section two contains no matter pertinent to the question before us. Section three reads:

"Said court of appeals shall have jurisdiction to review and determine all judgments in civil causes now pending upon the docket of the supreme court or wherein appeals were perfected prior to the taking effect of this act or that may hereafter and during the life of the court of appeals be taken to

the supreme court for review, save and except writs of error to county courts."

This section is sweeping in its scope in that it confers jurisdiction on this court to review and determine *all* judgments in civil causes pending upon the docket of the supreme court when the act took effect as well as those from which appeals were perfected at that time but not docketed, also all judgments thereafter taken to the supreme court for review during the life of this court, excluding writs of error to the county courts. I think it clear that the jurisdiction conferred applies to all judgments whether then pending on appeal or error or thereafter taken to the supreme court for review. The section eliminates all doubt as to this court having jurisdiction to review and determine such judgments. It must not be forgotten, however, that jurisdiction in a court to review and determine certain judgments *if properly before it* is one thing. The existence of a condition which enables such court to exercise that jurisdiction is another. The jurisdiction here conferred is entirely derivative. Before the jurisdictional powers conferred can be exercised the record of the judgments mentioned must be rightfully on the court's docket or within its possession and control. It therefore follows that we must scan the act to ascertain what method if any has been therein prescribed for transferring from the supreme court to this tribunal the records of such judgments. We find, as will be seen later, that the legislature has prescribed only two ways by which such judgments can reach the docket of this court: One by mandatory order of transfer; the

other entirely dependent upon the will or discretion of the supreme court.

Section four repeals existing statutes regulating appeals from district and county courts to the supreme court, and, with the exception contained in section six, strips the supreme court of every vestige of jurisdiction over causes therein pending on appeal, as well as causes that may be thereafter docketed on appeal. It also contains a mandatory order to that tribunal to immediately upon organization of this court, or thereafter, transfer all such causes to the docket of this court for hearing and determination. Not a word can be found therein providing for transfer to this court of causes therein pending on error. As I interpret this section, it also manifests a clear intent on the part of the legislature to only deprive the supreme court of jurisdiction over all docketed *appealed* causes, as well as perfected appeals not docketed.

Section five provides that:

"The supreme court is also hereby authorized to transfer to said court of appeals for hearing and determination such other civil causes now or hereafter and during the life of said last mentioned court pending before the supreme court on error as it may deem advisable, omitting however writs of error to county courts," etc.

To my mind this section shows that the legislature intended that all cases pending on error in the supreme court should remain there and by it be determined, unless that tribunal deemed it advisable to transfer such cases to this court for final hearing and determination, and it would seem that such intent is made more apparent by the fact that

the section further provides that even when the supreme court has exercised such discretion by transferring such causes to this court for determination, an unconditional right is reserved to either party litigant or his attorney to have the same returned at once to the supreme court for final determination. All that is required is a mere request, embodied in a written petition by one of the parties, to be filed within a specified time. This section not only emphasizes the intent of the legislature to which I have last referred, but goes further, as I construe it, and evinces a marked solicitation for litigants in that it reserves to them the unqualified right to have every judgment in a civil cause which has been removed by writ of error to the supreme court heard and finally determined by that supreme tribunal. It is true the section provides that this court may hear and determine any such cause when transferred to it as aforesaid, but either party may, as above shown, deprive this tribunal of any right whatever to consider or determine the same. If litigants neglect to avail themselves of this right they cannot complain.

Section six relates to remanding all causes of a specified class from this court to the supreme court, and authorizes writs of error from the latter to the former court to review decisions of this court which involve certain specified subjects and amounts.

Section seven provides that the court of appeals shall have the power to adopt rules concerning its procedure; that it shall be a court of record; have a seal; and have power to issue all necessary and proper writs and process in aid of its jurisdiction, etc., and contains other provisions concern-

ing practice and procedure. Section eight refers only to matters concerning removal of causes by writ of error to the supreme court from the lower courts. Section nine provides the time this court shall cease to exist. Section ten the repeal of all acts in conflict with this act, and section eleven declares an emergency exists.

In the foregoing cursory analysis of the act I fail to discover any language which in terms or by fair implication empowers this court to re-enter on error. Can such power be found to exist in other legislative enactments or in the decisions of our supreme court? In endeavoring to solve this question, the distinction between a cause removed to the supreme court by appeal and one removed there by writ of error should be kept in mind. The former proceeding is the continuation of an existing action, the latter a new proceeding in the nature of an original action. A right of appeal may be granted or abolished at any time by the legislature. At common law a writ of error was a matter of right. It is not so in this state. *San Miguel Con. Gold M. Co. v. Suffolk Gold M. & M. Co.*, 24 Colo., 468.

"Jurisdiction, when applied to the courts, is the power to hear and determine a cause." *Whipple v. Stevenson*, 25 Colo., 447.

It would seem that prior to the passage of code section 423 (revision 1908) the practice of re-entering a cause on error following its dismissal on appeal was not known. At the time the act was passed the former court of appeals was in existence. Prior to that time there must necessarily have been many cases of hardship resulting from dismissal of appeals after the three-year limitation on writs of

error had expired, and it is a plausible presumption that some industrious litigant, who had suffered from the necessary consequence of a dismissed appeal after three years, applied to the legislature for a remedy, which resulted in the passage of said act. The act was in direct terms made applicable only to the supreme court and the then existing court of appeals. *That* court of appeals had power to issue writs of error to, and determine causes directly appealed from, the subordinate courts of record. No such power exists in this court. If, under the provisions of that act, a cause pending therein on appeal was shifted to one pending on error no question could arise as to the court's authority to redocket the case on error following dismissal of the appeal. The legislature gave that court full power, irrespective of the supreme court, to bring the record from below directly to its docket by force of its writ of error. By the terms of the act creating *this* court it was entirely problematical whether or not this court would ever have an opportunity to hear and determine a cause removed from a trial court by writ of error. Such right is entirely conditional upon the will of the supreme court. I attach more importance to this situation than seemingly does the majority opinion.

The case at bar reached the docket of this court because it was a cause pending on appeal in the supreme court, and that court was enjoined by legislative mandate to transfer it here. If the cause had been there pending on error instead of on appeal, it would have remained in that court for determination, and this court would have possessed no power to consider it in any manner, unless properly trans-

ferred here as a cause pending on error. It must be conceded that if this cause is entered on the docket of this court as one pending on error it is not different from any other cause of like nature. No astute reasoning can assign to it any other standing. It must be considered, treated and disposed of, by the same rules of practice, procedure and consideration, as any other cause of the same class. It is not pending on appeal, because as such it has been stricken from the docket. When such order was made it was out of this court for any and all purposes. Notwithstanding this fact it reappears and we find it on the docket side by side with other causes pending on error which have been lawfully transferred thereto by solemn act of the supreme court. It appears to me that by a mere stroke of the pen this court has legislated it onto its docket as pending on error after all its jurisdiction had been exhausted in striking it from its appeal docket.

I am at a loss to understand how this court may lawfully assume to hear and determine a cause pending on error unless it can say such case is one which the supreme court in the exercise of its discretion transferred to this docket, as a cause which had been therein pending on error. As I believe the law to be, no other answer can receive legal sanction. By re-entering the case as pending on error, and then proceeding to hear and determine the same, the court appears to me to be doing indirectly that which it cannot do directly, and to be exercising unauthorized jurisdictional powers.

As I read the opinion of the court it finds ample authority to sustain its conclusions in the code section heretofore mentioned and decisions of our ap-

pellate courts therein cited. I cannot agree that the code section is applicable to the jurisdictional powers of this court. Neither can I agree that the decisions cited are authority to sustain the opinion under the situation existing here. If, at the time the code section was enacted, an act of the legislature was deemed necessary to confer authority to enter a cause on error, following its dismissal on appeal, on the supreme tribunal of the state, possessing as it did transcendent judicial powers, surely this court, limited both as to jurisdiction and judicial existence, must be able to point to some legislative enactment which clearly clothes it with equal authority. I feel that the framers of the bill creating this court either by intention or oversight omitted to directly confer on this court the power to re-enter a cause on error following its dismissal on appeal, and that such omission was fatal to the exercise of the right claimed for it in the opinion.

I am somewhat tempted to debate some of the matters stated in the opinion, but to do so would inexcusably prolong this already lengthy dissent. I have carefully read and considered the opinion of the court and all authorities therein cited, but find nothing therein to disturb the conviction I entertain. I do not think the cited case of *Bowling v. Chambers*, 20 Colo. C. A., 117, is very helpful in this discussion. Subsequent decisions of the supreme court germinate a doubt in my mind as to just what extent that decision can be considered authority on the question here raised.

I might further say that I find language in the court's opinion adverting to the hardships that would be entailed on litigants if a rule opposite to

that announced should obtain. I can readily concede this to be probable and would prefer to be influenced by the suggestions if I could feel warranted in so doing. It might be said, however, that such suggestions partake somewhat of the qualities of a two-edged sword. On the one hand the appellant secures an appeal to the supreme court, which, when challenged, proves to be defective or unauthorized and must necessarily be dismissed upon proper proceedings being taken for that purpose by his adversary. In such a case certainly the appellate court cannot be censured. The blame, if any, must be attributed to the appellant himself. An appeal being entirely a statutory right, it becomes incumbent upon one desiring to resort to that remedy to carefully search the statutes and therefrom ascertain whether or not he is entitled to an appeal. The law permitting appeals as well as the rules of courts applicable thereto are always accessible to a diligent party. If, by the exercise of reasonable diligence, the appellant discovers his cause is not appealable, he can at once resort to a writ of error, and thus protect himself from any error or injustice imposed upon him by the rulings and proceedings in the lower court. On the other hand has not the appellee a right to complain of the long delay he has been compelled to suffer? The matters of contention between himself and appellant having been decided in his favor in the lower court, may he not fairly insist that the appellant court should not turn a too willing ear to pleadings of his opponent for relief from a situation for which he is alone responsible, and in the creation of which appellee took no part?

The question before the court impresses me as one for serious consideration, and its solution involves the very right of the court to act in the premises. My convictions are based on the following propositions:

1st. The power of the supreme court and then existing court of appeals to re-enter a cause on error following its dismissal on appeal was conferred on those courts by a special act of the legislature, without which they possessed no such power, and cannot be extended to include the present court of appeals.

2nd. The authority and duty of this court, as well as the supreme court, to dismiss an appeal not authorized or properly taken, is not conferred by any code provision. The court is compelled to dismiss it for lack of jurisdiction when it is made to appear that the statute concerning appeals has not been complied with or the cause is one which is not appealable under the law.

I have a conviction that all this court can do in the premises is to dismiss the appeal without prejudice to a writ of error.

I have written the foregoing under considerable embarrassment, owing to the fact that I stand alone in the views expressed. The well known integrity and legal ability of my associates impels me to a sensitive appreciation of the unsought position in which my convictions have placed me.

Decided May 13, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3387.]

SISTERS OF CHARITY OF CINCINNATI V. BURKE ET AL.

1. *CONTRACTS—Construction—Building Contract—Written Order for Extras.* The contractor for the installation of a steam heating plant, at the request of one representing the owner, furnishes appliances not specified in the written contract for the work. The owner after they are furnished and put in agrees to pay first cost therefor, and the cost is arrived at by mutual agreement. The contractor is entitled to a lien for such cost price, though the contract stipulates that no extras shall be charged for unless upon written order from the superintendent, or a previous adjustment of the amount to be paid therefor.

2. *APPEALS—Findings on Sufficient Competent Evidence,* will not be reviewed.

Appeal from Pueblo District Court. HON. CHARLES S. ESSEX, Judge.

Mr. F. R. McALINEY, for appellant.

MESSRS. HARTMAN & BALLREICH, Mr. CHARLES L. AVERY, for appellees.

CUNNINGHAM, Judge.

The Sisters of Charity, of Cincinnati, Ohio, a corporation, appellant here, defendant below, entered into a contract with appellee, Burke, whereby the latter was to install a steam heating system in a hospital owned and operated by appellant in the city of Pueblo. A considerable balance of the original contract price remaining unpaid, Burke, together with the two appellee companies, who had furnished him material and otherwise aided him in the construction of the plant, filed their liens against the property for the balances claimed to be due them. There is no dispute as to the balances remaining unpaid the appellees on the several contracts, ex-

cept as to the amount claimed by Burke for certain extras or alterations. Appellant contends (a) that the lien statements were not filed in apt time (b) that the work done by Burke was radically defective, and the steam heating plant wholly unsuitable for the purpose for which it was designed.

1. The trial was to the court without a jury. Specific findings of fact were made by the judge, which, if correct, or warranted by the evidence, justified the judgment entered thereon in favor of appellees. Upon every material question of fact necessary to support the findings and judgment, the evidence is in hopeless conflict, where same is contradicted at all by appellant. All the evidence concerning the manner in which Burke performed his work, and the causes of the unsatisfactory behavior of the plant, was given by witnesses who testified in open court. Various witnesses of experience testified on behalf of the plaintiffs, and the defendant. Plaintiffs' witnesses pronounced the plant satisfactory in all respects, and attributed its unsatisfactory working entirely in the incompetency of the engineer employed by defendant. Defendant's witnesses testified that the plant was defective in almost every respect. The trial court evidently accepted the testimony of the plaintiffs' witnesses and rejected that given by defendant's witnesses, wherever there was a conflict in the evidence. As we read the record, there is in it ample evidence to support the findings and judgment of the trial court, including the finding that the liens were filed in apt time.

2. Complaint is made by appellant that certain extras were furnished by Burke without a written order from the superintendent or a previous de-

termination of the amount which should be paid by the owner or allowed by the contractor for the same. This is an apparent departure from one of the conditions of the written contract under which Burke was performing the work. But, it appears from the evidence that those extras or alterations were made at the request of a representative of the Hospital Company, and under her observation. Moreover, after some wrangling as to what Burke should be allowed for them, he agreed to put them in at their actual cost to him, and he testified that the representative of the Hospital Company consented and agreed to pay that price for them, and at the same time it was determined what the extras at such cost prices aggregated. Under such circumstances we think the extras were properly allowed by the trial court.

Chicago E. & L. R. Co. v. Moran, 187 Ill., 316; 58 N. E., 335. *Kilby Mfg. Co. v. Hinchman Co.*, 132 Fed., 957. *Galliope M. Co. v. Herzenger*, 21 Colo., 482.

There were certain alterations made in the plans, after the same were signed. The principal change or alteration involved the substitution of a cement sump for an iron or metallic catch basin. This catch basin, as we understand it, was designed to take care of the returning water produced by the condensation of the steam in its rounds through the building. Burke had ordered the metallic catch basin provided for in the plans, when he was directed by a representative of the heating company to substitute the cement sump, for reasons not necessary here to set forth. The heating company, as we shall presently see, was designated in the Burke

contract as the superintendent under whose direction he was to act in installing the plant. There is also evidence that the substitution of the sump was ordered by the heating company after a consultation between its representative and one Flaherty, and an agreement on the part of Flaherty that such change was necessary. There is a sharp dispute on the question of Flaherty's authority to represent or bind the Hospital Company, but it must be conceded that there is substantial evidence that he possessed such authority. Moreover, the trial court found that a representative of the hospital, one of the Sisters, was present when this and all other changes were required, and consented thereto, and we think there is evidence sufficient to support this finding, which is the only thing within our province to determine. Furthermore, there is no dispute but what one P. P. Mills was the architect or superintendent who represented the interests of the Hospital Association during the entire construction of the building, including the installation of the heating plant. After the plant had been substantially completed, certainly after the substitution of the cement for the metallic sump, Mr. Mills gave to Burke the following certificate:

"This is to certify that I accept the steam heating for the addition to St. Mary's sanitarium and laundry, Pueblo, Colo., as to present utility and efficiency."

Mills was probably prompted to thus qualify his certificate by the fact that there was in the contract a provision for a test of the steam plant which could only be made in extremely cold weather. It further appears that for more than a year the ce-

ment sump had been in use, and no specific complaint was made of it; the sole complaint by the proprietors of the hospital being that the plant did not work satisfactorily. The cause of the defective working, we have already considered and disposed of.

It seems probable that the connecting of the catch basin with the sewer was, as appellant contends, a very desirable arrangement, but there is nothing in the evidence to show that the plans of the contract under which Burke performed his work, required him to so connect it, and there is evidence tending, at least, to establish appellee's contention that such connection was not necessary.

3. By the terms of the written contract under which Burke installed the plant, it was provided that in the event of the refusal or neglect of the contractor to supply a sufficiency of properly skilled workmen, or in the event of his neglect or failure in other respects, that the owner might, after ten days' written notice to the contractor, take charge of and complete the work, charging to the contractor whatever the same might cost the owner to complete. The plant was practically completed, but not working well. After calling Burke's attention to the defect on several occasions, appellant, the owner, employed another steam fitter to take complete charge of the plant, authorizing him to make any alterations or changes that he might see fit. All this without any notice whatever to either Burke or the Automatic Heating Company, which, by the terms of the Burke contract, was made the arbiter and superintendent in connection with Burke's construction of the plant. Upon every occasion that

complaint was made to Burke by the proprietors of the hospital, touching the working of the plant, he seems to have promptly responded, and he testified that on each of the eight or nine occasions he was able, by a proper manipulation of the engine and pumps, to stop the "pounding," which was the chief complaint made against the working of the plant, and succeeded in heating up the rooms satisfactorily. His testimony in this behalf was uncontradicted. He further testified that he was at the plant on Saturday before Morgan was set to work by the owners on Monday, arranging to install certain devices calculated to guard against even the inefficiency of the engineer. On Monday when he returned to the plant with these devices which he had ordered, he found Morgan in charge and at work making repairs. Morgan, the mechanic employed by the owner to reconstruct the work, seems to have practically rebuilt it. At any rate, he charged and was paid almost \$2,000 for his work, whereas the original cost of the plant was about \$5,500. After the plant was thus reconstructed by Morgan, it appears to have given satisfaction, but it also appears that at or about that time there was a change made in engineers. It may be that the plant as reconstructed by Morgan was a more satisfactory institution; certainly it was a much more expensive one. Burke's plans called for the installation of what is known as the Paul system. This system had been selected by the Hospital Company, and with its selection Burke had nothing whatever to do. It was his duty, under the contract, to install it under the superintendency of the Automatic Heating Company that controlled the

Paul system, which was a patented device. He appears to have installed it to the entire satisfaction of the Automatic Company, and they gave him a certificate in writing to that effect, and also on the stand testified that he had followed their plans absolutely, and that his work was even better than his contract called for. By the Burke contract it was provided: "that the work included in this contract is to be done under the direction of the said superintendents, and that their decision as to the construction and meaning of the drawings and specifications shall be final." As we have said, the superintendent was the Automatic Heating Company, who gave the above mentioned certificate to Burke. Mr. Siebenman, who represented the company in superintending the work, and in drawing the specifications, testified that he had been advised by the Sisters that their means were limited, and that they would have to be careful about the expenses, and that he had in mind this fact when drawing specifications, that is, that the item of costs was an important one to the Sisters. Hence as we have observed, it is not improbable that after spending \$2,000 more in the way of repairs, the plant may have been improved by the Hospital Company. However, this fact is disputed by several experienced witnesses who were called by appellees. These witnesses testified that all the alterations made by Morgan were quite unnecessary.

In view of the conflicting evidence, and the sweeping findings of the trial court, in every instance in favor of the appellees, we deem it our duty to affirm the judgment, which is accordingly done.

Affirmed.

[No. 3400.]

CALIFORNIA MILLING AND MINING Co., LIMITED, v.
ROCKY MOUNTAIN NATIONAL BANK ET AL.

Appeal entered as a writ of error on the authority of *Western Lumber & Pole Co. v. City of Golden*, ante.

Appeal from Gilpin District Court. HON. FLOR
ASHBAUGH, Judge.

Mr. HENRY J. HERSEY, Mr. ARTHUR PONSFORD,
Mr. WILLIAM E. HUTTON, Messrs. DAYTON & DENI-
OUS, for appellants.

Mr. H. A. HICKS, Mr. CHARLES W. WATERMAN,
for appellees.

CUNNINGHAM, Judge.

Appellants have filed a motion to remand this cause to the supreme court, and appellees have filed a motion to dismiss the appeal. The judgment in the case does not appear to relate to a franchise or to a freehold, and does not amount, exclusive of costs, to the sum of \$100.00, nor is the construction of any provision of the state or federal constitution necessary to the determination of the cause. Therefore, the motion of appellants to remand the cause must be denied, and for the same reason the motion of appellees to dismiss the appeal should be granted.

The principal contention of the parties on brief and on oral argument pertains to the right of this court to re-enter the case as pending on error. We have just decided, in the case of *The Western Lumber and Pole Company v. City of Golden*, case No. 3386, that this court has the authority, and that it

is its duty, under facts and conditions similar to those presented by the record in the instant case, to order the case re-entered as pending on error.

The motion of the appellants to remand the case is denied. The motion of the appellees to dismiss the appeal is granted, and on the authority of the *Western Lumber and Pole Company* case, *supra*, and for the reasons assigned in the opinion handed down in that case, it is ordered that this case be re-entered as pending on error.

HURLBUT, Judge, dissents from so much of the opinion as pertains to the right of this court to re-enter the case as pending on error.

Decided May 13, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3420.]

BLOOMER V. CRISTLER.

1. NAMES—*Idem Sonans*. Names of identical sound in pronunciation, though of different orthography, are regarded as identical. This doctrine applies to records, judgments and the like.

Brooks is not *idem sonans* with Brooke.

2. JUDGMENT—*Substituted Service*. Where on a bill to quiet title the decree goes by default, upon mere publication of the summons, in which Brooks is named as defendant, those claiming under Brooke are not affected unless there is evidence of the identity in fact of Brooks with Brooke.

3. TAX TITLE—*Void Deed*. A tax deed void on its face does not set in motion the five years statute of limitation.

4. LIMITATION—*Payment of Taxes*. To avail of the payment of taxes under color of title as a defense to a bill to quiet title to lands, the defendant must show payment of all taxes legally assessed against the lands for seven successive years.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

MR. AUGUST MUNTZING, MR. EGBERT MORE, for appellant.

MR. CHALKLEY A. WILSON, MR. ASHER B. WILSON, for appellee.

HURLBUT, J.

Action by appellee (plaintiff below) against appellant (defendant), to quiet title to land in Yuma county.

Complaint is in usual form, based upon sec. 255, Mills' Annotated Code. Defendant filed answer and cross-complaint. The former contained admissions and denials of the allegations in the complaint, and in addition set up title in himself under tax deed of January 15th, 1901; also pleaded the five-year statute of limitation, sec. 3904, Mills Annotated Statutes. The third defense pleaded the seven-year statute of limitations under claim and color of title in good faith and payment of all taxes for seven successive years—sec. 4090, R. S. 1908. The fourth defense pleaded *res judicata* based upon a judgment of the county court in an action to quiet title to the premises, in which action defendant's grantor, August Muntzing, was plaintiff and Richard Brooks et al. were defendants. The cross-complaint is substantially the same as the complaint with the exception of names. Plaintiff filed replication to defendant's answer, admitting and denying new matter stated therein, and pleaded title to the premises by *mesne* conveyances from the United States government, her immediate grantor being

Richard *Brooke*, and also pleaded the invalidity of said tax deed and county court judgment.

The case was tried to the court without the intervention of a jury, and judgment rendered for plaintiff.

Error is predicated upon the refusal of the lower court to admit in evidence an exemplification of the record of the said county court judgment, said judgment being based upon substituted service by publication of summons. The action was begun in the county court by August Muntzing, plaintiff, against Richard *Brooks* et al., defendants, none of whom, unless it be Brooks, is shown to have ever been connected with the title to the property. The summons published was directed to Richard Brooks; the affidavit of publication recited Richard Brooks as one of the defendants; the order for publication of summons was directed to Richard Brooks; *praecipe* for default and judgment was asked against Richard Brooks, and the judgment itself was against Richard Brooks. So it appears that the entire proceedings in the county court were conducted against Richard *Brooks* et al., while the title to the premises appeared of record in the name of Richard *Brooke*, who was plaintiff's immediate grantor. The record shows that the title to this property was originally patented by the government to Mathew Harr, who afterwards with his wife executed a deed of the premises to Richard *Brooke*.

The doctrine of *idem sonans* is, that where two names are spelled differently but sound alike in their pronunciation, they are to be regarded as the same. In our language the consonant "s" terminating the

letters of a name is seldom silent. If it appears as the last letter of a name the pronunciation thereof conveys to the ear an entirely different sound than that conveyed when the consonant is omitted. The converse is equally true.

Moore v. Allen, 26 Colo., 197, decided that it was fatal error in the trial court to admit in evidence a deed executed by *Waldimar* Arens, attorney in fact for the grantors, where it was shown that the power of attorney had been executed to *Waltimore* Arens. It was there claimed that *Waltimore* and *Waldimar* came within the doctrine of *idem sonans*. The court says:

“In the matter of names, orthography is not important if the sound is the same—*Marr v. Wetzell*, 3 Colo., 2—and it is sufficient in law to spell a name as it is regularly or commonly pronounced (16 Ency. Law, 126). But here the difference in the two names is so marked that the attentive ear would find no difficulty in distinguishing between them, and the difference in spelling is such that necessarily the pronunciation is equally distinct. The proper rule to observe in applying the doctrine of *idem sonans* being, ‘that if two names, according to the ordinary rules of pronouncing the English language, may be sounded alike without doing violence to the letters found in the variant orthography, then the variance is *prima facie* at least immaterial and may be so decided by the court.’

Applying this rule, it is at once apparent from an inspection of the orthography of the two names that in the absence of information other than thus obtained the variance is fatal.”

From 29 Cyc., 275, we extract the following:

“Usually insertion or omission of a ‘t’ before the ending ‘son’ is held immaterial, as is also the omission or addition of a final ‘e,’ the two names being considered *idem sonans*, but the addition or omission of a final ‘s’ is usually held a fatal variance.”

Many cases are cited in support of the text, viz.: “Semon” and “Semons” in *Semon v. Hill*, 7 Ark., 70; “David” and “Davids” in *Davids v. People*, 192 Ill., 176; “Meyer” and “Meyers” in *Gonzalia v. Bartelsman*, 143 Ill., 634; “Wood” and “Woods” in *Neiderluch v. State*, 21 Tex. C. A., 320, are all held not to come within the rule of *idem sonans*, therefore fatal variances. Some of these cases are criminal and some civil, but in each case it is held that the doctrine of *idem sonans* does not apply.

It seems to be well settled that where the judgment is founded upon substituted service of summons the defendant’s name must be correctly given in the notice. The doctrine of *idem sonans*, however, applies to records, such as judgments, dockets, etc., but in each of the next hereinafter cited cases the appellate courts held a judgment void based upon substituted service of process wherein it appeared that the published notice failed to correctly state the name of the defendant.

Troyer et al. v. Wood, 96 Mo., 478. *Chamberlain v. Blodgett, Id.*, 482. *Hubner v. Reickhoff, Exec.*, 103 Iowa, 368.

Viewing this case in the light of these authorities, Richard Brooke and Richard Brooks cannot be considered *idem sonans*, and, there being no evidence as to Richard *Brooks*, mentioned in the county

court judgment, being the same person as Richard *Brooke*, plaintiff's immediate grantor, the court ruled properly in excluding the county court judgment and files from evidence.

In support of title pleaded by defendant, he offered in evidence a tax deed which is set out in full in the abstract of record. The deed does not show the date of its execution by the treasurer, but the certificate of acknowledgment shows that he executed the conveyance on January 16, 1901. The property was purchased by the county at the tax sale. It was admitted at the trial that whatever title Muntzing acquired under this deed had passed to and become confirmed in defendant at the time the deed was offered in evidence. This deed was objected to when offered, for the reason that it was void on its face, and the court sustained the objection. We think the ruling was correct. The deed was void upon its face.

Kit Carson Land Co. v. Gordon, 51 Colo., 115; 121 Pac., 1024. *Empire Ranch & Cattle Co. v. Col-dren*, 51 Colo., 115; 117 Pac., 1005. *Bryant v. Miller*, 48 Colo., 192.

We observe that in neither of the briefs filed by appellant does he refer to the ruling of the court in excluding the tax deed from evidence, hence we deem it unnecessary to make further comment thereon.

It seems from the record that the decree contains a finding that plaintiff was in the actual possession of the premises and also adjudges plaintiff to be in the actual possession thereof. Counsel for appellant complain of this, and assert that there was no evidence showing that plaintiff was in ac-

tual possession of the premises. This is true. It was admitted in the pleadings that the premises were vacant and unoccupied land, and there was no evidence whatever on behalf of either party that they were or had been in actual possession of the premises. The recital was an apparent inadvertence on the part of the trial judge, as there was no evidence to support the same in that behalf. We do not think, however, the decree is fatally defective for that reason. Plaintiff pleaded title in fee to the premises, and supported the same at the trial by government patent and sundry mesne conveyances thereafter. Defendant, having wholly failed to prove any title whatever to the premises or any possession thereof could not be prejudiced by the recitals alluded to. Plaintiff's fee simple title proven at the trial implied constructive possession of the premises.

The deed being void on its face did not set in motion the five years statute of limitations pleaded. *Gomer v. Chaffee*, 6 Colo., 316; *Page v. Gillett*, 47 Colo., 289. Defendant having failed to prove that he had paid all taxes legally assessed against the property for seven successive years, the defense of the seven years statute of limitations pleaded was not sustained.

Finding no error in the record the judgment will be affirmed. *Judgment Affirmed.*

[No. 3426.]

TOLL V. COBBEY.

1. BANKS, INSOLVENT—*Liability of Stockholders—How Enforced.*
Prior to the banking act of 1907 (Laws 1907, c. 111, Rev. Stat.,

c. 11), the individual liability of stockholders, in insolvent banking corporations, was enforced by a suit in equity, by or on behalf of all the creditors, against all the stockholders.

The court might lawfully proceed to judgment against all stockholders served or appearing, retaining and continuing the cause as against those of whom jurisdiction had not been acquired, for the purpose of proceeding against them or their property.

2. — *Equitable Owner of Stock—Liability.* It seems that the equitable owner of shares standing upon the books of the bank in the name of another may be charged.

3. — *Attachment—Constructive Service of Summons.* The property of a non-resident equitable owner of shares may be attached, and in such case summons by publication suffices to authorize a judgment enforceable against the attached property.

4. — *Parties—Bringing in New Parties.* No specific order is necessary to entitle the plaintiff to bring in a new party defendant. Under general leave to amend his complaint he may add parties, without any especial order to that end.

5. *APPEALS—Harmless Error.* An order allowing a plaintiff to "refile" his complaint as the basis of a renewed effort to obtain service of process upon a defendant, after such service, once attempted, has been quashed, is irregular; but the error affecting no substantial right is harmless.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MESSRS. STOKES & SHERMAN, for appellant.

MR. PHILO B. TOLLES, MR. THOMAS D. COBBEY, for appellee.

Judgment affirmed.

WALLING, Judge.

Appellee, a creditor of The Western Bank, an insolvent banking corporation, brought suit, on behalf of all of the creditors of the bank, against the corporation and many persons, as alleged owners of its capital stock, to enforce the liability imposed by

statute upon the stockholders of the bank for its unsatisfied indebtedness. Appellant was not made a party to the original complaint, or to the first amended complaint. Upon a motion filed by a defendant to the amended complaint having been sustained, the plaintiff was given leave to amend his complaint; and thereupon a second amended complaint was filed, wherein appellant was for the first time named as a defendant. The second amended complaint, among other things, alleged, in effect, that appellant's deceased husband was, at the time of his death, the owner of ten shares of the capital stock of the defendant bank, which stood on its books in the name of The Wallace Investment Company, and that appellant became the owner of the same shares, under the provisions of her husband's will, and, by reason of her ownership of those shares, was individually liable for the debts of the bank, under the statute, to the amount of two thousand dollars. Thereafter a decree was entered in the suit, wherein judgment was given against a number of the defendants, as stockholders of the defendant bank, for the full amount of the liability of each, in accordance with the terms of the statute fixing such liability. It was stated in that decree that appellant, and others named, "are non-residents of the state of Colorado, were not served, and made no appearance in said action;" and it was "ordered that this cause is continued upon the docket of this court * * * for such other and further proceedings as may be proper to bring any other of the said defendants, not now before this court, in this cause; and to adjudicate said claims of the said creditor plaintiffs against them, or against any property of such defendants,

which may be found within the jurisdiction of this court."

A few months after the entry of the decree, the plaintiff caused a writ of attachment to be issued, in the action, to the sheriff of the City and County of Denver, against the property of appellant, for the amount of her liability as alleged in the second amended complaint; and the writ was levied on property belonging to appellant. Soon after the attachment was levied, an *alias* summons was issued in the cause, in which appellant was named as a defendant, and an effort was made to obtain service by publication of the summons. It appeared from the affidavit and order for publication that appellant was a party to the action, and a non-resident of the state. Upon motion of attorneys for appellant, specially appearing for that purpose, the attempted service by publication was ordered to be set aside, for the reason, as stated in the order, that appellant had not properly been made a defendant in the cause. The motion to quash the service of the summons stated that appellant resided in the state of Massachusetts. A few days later, on motion of plaintiff's attorneys, an order was entered permitting the plaintiff to make appellant a defendant, and to refile his second amended complaint, "in which the said Katharine W. Toll appears as a party defendant," and authorizing summons to be issued as provided by law." The second amended complaint was thereupon marked "refiled," and another summons was issued, and placed in the hands of the sheriff of the City and County of Denver, for service. Upon due return of that summons by the officer, certifying that, after diligent search, he was unable to find ap-

pellant, and the filing of a proper affidavit of her non-residence, a new order was made for the publication of the summons; and it was published accordingly, and a copy thereof duly mailed to appellant. Appellant again appeared specially, by her attorneys, and moved to quash the service of the summons by publication, which motion was overruled by the court. No further appearance having been made by appellant, judgment by default was given against her, in what was styled a "supplemental decree," for the amount found to be due on account of her stockholder's liability, and the attachment against her property was sustained. From that judgment this appeal was taken.

The assignments of errors alleged on the record here challenge the jurisdiction of the court to render the judgment or decree against appellant. The argument in support of the assignments proceeds generally upon the propositions that appellant never became a party to the action, so as to authorize the attachment of her property, and the issuing of summons against her therein, that the order made by the court, after quashing the first attempted publication of the *alias* summons, and when several terms of the court had elapsed since the first judgment was rendered in the cause, permitting the second amended complaint to be "re-filed," and summons to be issued, was in excess of the jurisdiction of the court, and that all of the proceedings shown by the record, so far as they undertook or purport to affect appellant, or her property, including the judgment against her were *coram non judice* and void.

1. It was established by the decisions of our supreme court, prior to the enactment of the banking act of 1907 (see R. S. 1908, sec. 324), that the individual liability imposed by statute upon the stockholders of an insolvent banking corporation was to be enforced in equity, and in a suit brought by or on behalf of all the creditors against all the stockholders, who could be subjected to the processes of the court, whether by personal service of summons upon them, or by attachment of their property, within the state.

"It is settled in this jurisdiction, by *Zang v. Wyant*, 25 Colo., 551, that the proper procedure to enforce the liability of stockholders in an insolvent bank for debts of the corporation, under the statute here under consideration, is by a suit in equity by a creditor or creditors, for the benefit of all creditors, and against all the stockholders." *Adams v. Clark*, 36 Colo., 65. See also *Buenz v. Cook*, 15 Colo., 34; *Richardson v. Boot*, 18 Colo. App., 140.

The suit was administrative in character, the main purpose being to enforce contribution by as many of the stockholders as practicable, within the limit of liability fixed by the statute, to the satisfaction of the whole indebtedness of the insolvent bank in excess of its assets. The judgment was rendered for the benefit of all the creditors, but against the stockholders severally. For reasons not necessary to discuss, it was frequently impossible, or at least impracticable, to acquire jurisdiction of the persons or property of all of the stockholders, within a reasonable time after the institution of the action. The proceeding being for the benefit of creditors, they were entitled to as speedy relief against defendants

actually brought into court, as the nature and circumstances of the case permitted; and to delay the entering of judgment against the stockholders served, until all could be brought in, would, in conceivable cases, have resulted in defeating the object of the statute creating the stockholders' liability. It is plain that, in such a case, the court might lawfully proceed to judgment against the stockholders served or appearing, and retain the cause for the purpose of proceeding against other stockholders, as to whom, by reason of non-residence or otherwise, no jurisdiction had been acquired. In the present case, while the judgment rendered against the resident stockholders was final as to the defendants served, it did not necessarily terminate the court's jurisdiction over the subject of the action. The liability of the stockholders being several, it was not essential that all should have been included in the same judgment; and the court was empowered, after rendering judgment against the defendant stockholders, who had been served or had appeared, to continue the cause, for the purpose of acquiring jurisdiction of the persons or property of the others, who were named in the decree as being non-residents, not served, in order that complete relief might be administered with respect to the subject of the cause. See *Harper v. Carroll*, 66 Minn., 487; *Hanson v. Davison*, 73 Minn., 454; Mills' Ann. Code, sec. 223; *Johnson v. Waters*, 111 U. S., 640.

2. It was shown by the averments of the second amended complaint that appellant was a proper party defendant to the suit. She was therein named as a defendant, and judgment was prayed against her. Undue importance seems to have been at-

tached to the fact that there was no specific order of court permitting her to be joined as a defendant, prior to the entry of the first decree. It was held in *Louvall v. Gridley*, 70 Cal., 507, that a plaintiff, having leave to amend generally, might make a new party, by way of amendment, without special permission to do so. The provisions of section 75 of our code of civil procedure, enacted in 1887, with respect to the amendment of pleadings, were taken almost *verbatim* from the code of civil procedure of California, in force at the time of the decision of *Louvall v. Gridley*; and there is no good reason why the rule of that decision should not be adopted here. Further than that, the court, in its first decree, clearly recognized appellant as a non-resident defendant, who had not been served with process, and as included in the terms of the order, whereby the cause was continued upon the docket of the court for further proceedings, as above stated. Thereafter there could have been no substance in the objection that a formal order had not been entered allowing appellant to be made a party defendant. It results, therefore, that, in so far as the subsequent order setting aside the first publication of summons was based upon the idea that appellant had not been made a party, the ruling was manifestly incorrect. But appellant cannot claim any advantage by reason of any error of the court in deciding the motion. It is possible that other and sufficient reasons existed for quashing the attempted service. Be that as it may, it was evidently not in the mind of the court to relinquish the right to subject appellant's property, which had been attached in the cause, to any judgment which the plaintiff should obtain against her

therein, after lawful service of process. This is apparent from the order authorizing the second amended complaint to be "refiled," and summons to be issued "as provided by law," and the denial of the second motion made on behalf of appellant to quash the service by publication, as well as from the terms of the default judgment rendered against her, wherein it was found that "due and legal constructive service by publication has been made upon the said defendant, Katherine W. Toll," and the attachment of her property was expressly sustained.

3. It is true that the order authorizing the "refiling" of the second amended complaint was irregular, but it cannot be said that any substantial right of appellant was injuriously affected by the irregularity. The plaintiff had the legal right, upon this record, to renew the effort to obtain service, by proper proceedings to that end, upon the quashing of the first attempted service by publication of summons, and that right was recognized by the subsequent orders and proceedings in the cause. The truth is, that the confusion in the record, at this point, was the result of the mistaken position assumed by counsel for appellant in both of their motions to quash the service of summons by publication, and still strenuously urged in argument here, that appellant was never made a party to the action. We think that, under the liberal intendments of the code, she ought not to be permitted to derive an advantage from errors or irregularities, which were the direct result of her own action. * * * no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons or in the service of the summons, which error,

defect or omission, does not affect some substantial right of the defendant or defendants : thereby served." Mills' Ann. Code, sec. 38a, Laws of 1891, p. 83. "The court shall in every stage of an action disregard any error or defect in the pleadings or *proceedings*, which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Mills' Ann. Code, sec. 78.

Counsel for appellant have not pointed out, in their argument, any defect or illegality in the summons, or in the return thereof, or the affidavit or order for service by publication, or the publication itself. The court correctly held that the publication of the summons was sufficient constructive service to authorize a judgment against appellant, enforceable against her property attached in the cause.

4. Notwithstanding the objections raised in argument here, appellant had all the notice of the commencement and pendency of the action against her, that the plaintiff was able to give, and all that the law required to support the judgment rendered. The contention that, before appellant could be made a party defendant, she must have had notice of an application for that purpose, is not sound, and finds no support whatever in our code of practice. With full opportunity to appear and defend, she saw fit to rely finally on a special motion to set aside the service. She "had her day in court," borrowing the words of her counsel, and has no cause for complaint in that regard. The court did not err in overruling the special motion to quash the service by publication; and, no further appearance having been made

on behalf of appellant, judgment properly went against her. The judgment is affirmed.

Affirmed.

Decided May 13, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3427.]

PACE ET AL. V. CLINE ET AL.

1. TRIAL—*General Finding.* A general finding upon the issues raised by the complaint and answer may sustain a decree in favor of plaintiff, even though there is no finding upon the issues presented by a cross-complaint.

2. APPEALS AND WRITS OF ERROR—*Defective Findings—Objections Not Taken Below.* Defective findings are waived unless at the time of the trial attention is called to the defect, and a more full and complete finding requested.

3. SPECIFIC PERFORMANCE—*Decree—Directions as to Payment.* Bill for specific performance by vendee against vendor and another who had taken the title with notice. A decree in favor of the complainant made no provision as to whom payment should be made. The decree was modified so as to allow payment into court, if differences should arise between the two defendants, as to the disposition of the purchase money, and as so modified was affirmed.

Appeal from Delta District Court. HON. SPRIGG SHACKLEFORD, Judge.

Mr. MERLE D. VINCENT, Messrs. GOUDY & TWITCHELL, for appellants.

Mr. MILTON R. WELCH, Mr. D. C. BEAMAN, for appellees.

CUNNINGHAM, Judge.

This action was brought in the district court of Delta county by appellees, to enforce specific per-

formance of an option contract to purchase a certain lot in the town of Paonia, and to cancel a deed made by Pace to Curtis. The option contract was signed by one Albert B. Campbell, as agent for Pace, who, at the time, owned the lot, subject to certain incumbrances, as it is said. Pace, at the time, was in the state of Washington. A telegram and a letter were forwarded to him, advising him of the option contract given by Campbell to plaintiffs. After some correspondence Pace returned to Colorado, and sold the lot, together with other real estate adjoining it, to his co-defendant, Curtis. Campbell's authority to bind Pace by the option was questioned by the latter.

The defendant Curtis answered separately, and filed a cross-complaint wherein she alleged that Cline & Hufty, who were engaged in the real estate business, had been employed by her to purchase the lot in question of Pace for her. The case was tried without a jury. General findings were made by the court in favor of plaintiffs, and certain special findings were also made, namely, that Pace had ratified the agreement made on his behalf by Campbell with the plaintiffs; that tender had been made by the plaintiffs, under the option contract or agreement, of the balance due; that the option contract or agreement between Campbell, as Pace's agent, and the plaintiffs, had been made a matter of record before the transfer of the property by Pace to Curtis; that Curtis had full knowledge of the option given by Pace to plaintiffs, and was charged with notice thereof at the time she entered into the contract to buy the property from Pace, and that all her rights in the premises are subject to the rights of the plaintiffs.

The court made no special finding or direct reference to the cross-complaint of the appellant Curtis. We have carefully examined the evidence admitted on the trial, and are of opinion that it is ample to support the findings and judgment.

Counsel for appellant Curtis, however, insists that the failure of the trial court to make any finding of fact relative to defendant Curtis's rights as set out in her cross-complaint constitutes reversible error. The rule on this subject as applicable to the cross-complaint is in nowise different from the general rule applicable to findings of fact upon the issues raised by the complaint and the answer proper. A general finding is sufficient to support a judgment or decree. 38 Cyc., 1976-7. Especially is it true that a general finding will suffice in an equity case, where, as in this case, no complaint was made on the trial that the findings of the court were incomplete.

"It is claimed, however, that the findings of the district court are incomplete. If this be true, it is a matter which should have been called to the attention of the court at the trial. The code provides how a finding may be required upon a matter in controversy in an equity case; and if appellants wanted more specific findings, they should have availed themselves of the statutory method."

Larimer & Weld Ir. Co. v. Wyatt, 23 Colo., 487; 48 Pac., 531; 8 Enc. Pl. Pr., 933.

It is further contended by appellants that the trial court erred in directing plaintiffs, appellees, upon the tender to them of deeds by the appellants, to pay over the balance of the purchase money (provided for in their option contract) for said lots, without specifying to which one of the appellants the

same should be paid. We cannot assume that any difference will arise between the appellants as to which one the money should go to, or how it should be apportioned between them. If this difference should arise, plaintiffs may pay the money into court, there to be held until the respective rights of the appellants to the fund shall be determined in a proper proceeding, and the trial court is directed to modify its decree accordingly, should the necessity for doing so arise. But this modification of the decree, should the same be made, shall in no manner relieve the appellants from the duty of executing and delivering the deeds, as by the terms of the decree of the trial court, they are directed to do.

The judgment of the trial court is sustained.

Affirmed.

Decided May 13, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3442.]

VICTOR INVESTMENT CO. v. ROERIG.

1. EXECUTION SALE—*Vacating—Inadequacy of Price.* Land of the value of \$2,000, and encumbered for \$1,200, is sold on execution for \$100. Held that the sale was not to be vacated for inadequacy of price.

A bid for a fixed sum was communicated to the officer by telephone, and there being no other bids the land was struck off for the amount named, to the person so bidding. *Held*, there was no impropriety in the reception of a bid communicated in this manner, provided the officer made public outcry of the bid, at the place of sale, before striking off the land.

3. — *Presumptions as to Regularity of Sale.* The execution defendant seeking to vacate an execution sale of his lands has the burden of proving such irregularities in its conduct as

will overturn the presumption of regularity, which, under the statute (Rev. Stat., sec. 3648), attends the sheriff's deed.

4. — *Diligence Required of Defendant.* Mere want of knowledge on the part of the execution defendant of a levy upon his residence, or the sale which follows, will not entitle him, after the period of redemption has expired, to vacate the sale, when the sale is in all respects regular and such want of knowledge is not attributable to the purchaser at the sale, but to his own inattention. The courts are without power to arbitrarily extend the period of redemption in order to relieve the hardship of individual cases.

5. — *Duty of Officer Levying—Notice to Debtor.* The tendency of the decisions is that the failure of the officer to notify the defendant before levying on real estate on which the debtor resides will not authorize a court of equity to vacate the sale, after the period of redemption has expired.

6. *ATTORNEY—Duty to Direct Officer as to Levy.* The attorney controlling an execution owes to his client the duty to give the officer to whom the writ is committed proper directions.

7. — *Duty to Execution Defendant.* But even where a levy upon the lands where the execution defendant is residing is contemplated, such attorney is under no duty to the defendant to notify him of the intended levy.

And the attorney's knowledge of the failure of the officer to give such notice cannot be imputed to the purchaser at the sale who is other than the plaintiff in execution.

8. *STATUTES—Construed.* Sec. 2583 of Mills' Statutes (Rev. Stat., sec. 3637), refers only to an execution out of the district court.

9. — *Foreign, Adopted.* In ascertaining the meaning of a statute substantially identical with that of another state, the decisions of the courts of such state will be consulted.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. V. H. MILLER, Mr. JOHN A. GORDON, for appellant.

Mr. F. A. WILLIAMS, Mr. G. Q. RICHMOND, for appellee.

Judgment reversed.

WALLING, Judge.

In the year 1904, one Carmon obtained a judgment against appellee, in the county court of Teller county, for \$113.85 and costs. The judgment creditor was then and at all times mentioned herein a resident of the state of Washington, and he was represented by Victor H. Miller, an attorney-at-law residing at Cripple Creek, who prosecuted the claim to judgment. In April, 1907, execution was issued upon the judgment, by direction of Miller, as attorney for the judgment creditor, to the sheriff of the City and County of Denver, and levied on real estate in that city and county, owned by appellee, and occupied by himself and family as their residence. The levy was followed by sale of the property, under the execution, to the appellant, and, after the expiration of the statutory period of redemption, a sheriff's deed was executed to it. Thereafter this suit was commenced by appellee to set aside the execution sale, and cancel the sheriff's deed. The appellee obtained a decree in the district court, setting aside the sale and deed, upon the payment to the appellant of the purchase price paid for the property at the sheriff's sale, with interest. The court incorporated in the decree its findings of fact and conclusions of law, from which it appears that the decree was based upon the theory of gross inadequacy of the price bid, and for which the property was sold at the execution sale, to-wit, \$100, coupled with supposed unfairness in the conduct of the sale. The ultimate finding of fact was as follows: "That the facts and circumstances connected with the said sale are not sufficient to establish actual fraud on the part of either the purchaser, or officer conducting the sale, or the judgment creditor, but are suf-

ficient to show an unfairness in the conduct of the sale and not such as to encourage competition and adequate bids for the property." It was concluded, as matter of law, (1) "that inadequacy of price is not within itself sufficient to warrant the setting aside of the sale;" and (2) "that the circumstances of unfairness proven are not alone sufficient to invalidate the sale;" but (3) that the two elements combined were sufficient to justify the decree. On the part of the appellant it is contended that the evidence did not support the findings of the trial court, that the facts found, so far as supported by any evidence, did not warrant the conclusions based thereon, and that the decree was contrary to the evidence and the law. Without special reference to the findings, it is insisted by counsel for the appellee, in support of the decree, that the purchase price bid was grossly inadequate; and, further that there was evidence of irregularities in the levy and sale, which, in connection with the alleged inadequacy of price, sufficed to avoid the execution sale and sheriff's deed, as against the appellant. The evidence respecting the value of the property was, as is usually the case, very much in conflict, and covered a somewhat wide range of estimation. The trial court found that the property was "of the value of at least two thousand dollars," which sum was less than the estimate of some of the witnesses, and more than that of others, and may be considered as representing a fair average of all of the opinions given in testimony. The complaint alleged that the value of the property was \$2,300. In view of the superior advantages possessed by the trial court for weighing the testimony, its finding with respect to the value

will be accepted. The property was encumbered, at the time of the sale, with a mortgage amounting to \$1,200. We have not been referred to any authority in support of the conclusion that, under such circumstances, the bid of \$100 for the property at the execution sale was grossly out of proportion to its true value. The general trend of judicial opinion seems to be to the contrary, especially where the debtor is allowed by law a right of redemption from the sale. "At judicial sales, where there is a redemption, it is a well known fact that lands, unless where necessary to secure the debt, are rarely sold at anything approximating their real value. Such purchases are not looked upon as a desirable mode of investment. There is seldom competition. The creditor, for the most part, has to take the land in satisfaction of his debt and wait for it to be redeemed." *Watt v. McGalliard*, 67 Ill., 513, 517. See also *Clark v. Chapman*, 98 Calif., 110; *Kerr v. Haverstick*, 94 Ind., 178. The learned trial judge rightly concluded that the sale ought not to be vacated for inadequacy of price. *Conway v. John*, 14 Colo., 30; *Watt v. McGalliard*, *supra*; 2 Freeman on Exec. (3rd ed.), sec. 309; *Griffith v. Milwaukee Harvester Co.*, 92 Ia., 634.

Considering the objections to the sheriff's deed, arising out of claimed irregularities in the levy of the execution and the conduct of the sale thereunder, it will be observed that the deputy sheriff, who appears to have had the levy and sale in charge, was dead at the time of the trial. The facts, with respect to the proceedings under the execution, depend upon the testimony of the appellee, and of Victor H. Miller, who was the attorney for the plaintiff in the

execution, and was also vice-president and general attorney of the appellant, and acted for the latter in bidding at the sale. Miller was called for cross-examination, under the statute, by plaintiff's counsel, and the facts developed upon his examination stand uncontradicted. Appellee testified, in his own behalf, that he had no notice or knowledge of the issuing of the execution, or of anything done thereunder, until after the sheriff's deed had been recorded, and demand was made upon him for possession of the property by the appellant, through Miller, as its agent and attorney. It was not claimed that the execution or the return of the sheriff thereon disclosed any defect, or that the sale was not duly advertised, in the manner required by law. The contention is made, however, that the sheriff violated his duty in the premises, by failing to notify the defendant of the existence of the execution, so as to give him the opportunity to either pay the debt, or designate other property, sufficient to satisfy the writ, before levying upon his residence. In support of this claim, reliance is placed upon section 2539 Mills' Ann. Stats. (section 3608, R. S. 1908): "The plaintiff in execution may elect on what property he will have the same levied, except the land on which the defendant resides, which shall be last taken in execution, excepting and reserving, however, to the defendant in execution such property as is, or may be, by law exempted from execution." That section was part of the laws enacted by the first territorial legislature, and re-enacted in the revised statutes of 1868; and it has reappeared in each successive revision and compilation of the laws of the state. It does not seem to have been construed or

mentioned in any decision of our courts. We have no statute, which in terms requires demand upon or notice to the defendant in execution, prior to the levy of the writ. In fact, no method of procedure is prescribed, with respect to the levy of an execution, out of a county court, upon real estate, whether situated in the county wherein the judgment was rendered, or in another county. Section 2583 Mills' Ann. Stats. (section 3637, R. S.) refers only to an execution issued out of a district court. See *Herr v. Broadwell*, 5 Colo. App., 467.

"It has generally been held that it is not essential to the validity of the levy that the officer should give the debtor notice before making the levy, unless service of the writ is required by statute, even though the debtor has the right to designate which class of property shall be first taken," etc. 11 Am. & Eng. Enc. of Law, 650. A different rule, however, has prevailed in Illinois from an early period. See cases cited in 11 Am. & Eng. Enc. of Law, 650, note 2. Section 2539, Mills' Ann. Stats. (3608, R. S.), above quoted, so far as it relates to levying upon the land on which the defendant resides, more closely resembles a similar provision of the laws of the state of Illinois, existing both before and after the year 1861, than any to which our attention has been called; and it is reasonable, therefore, to consult the decisions of the Illinois courts, in arriving at a proper construction of our statute. The Illinois statute of 1845 provided: "The plaintiff may elect on what property of the defendant he will have his execution levied, except the land on which the defendant resides, and his personal property, which shall be last taken on execution." With-

out undertaking to review the decisions of the courts of that state, bearing upon the matter in question, it is enough, at present, to say that those decisions lead to the conclusion, that, in case of the levy of an execution on land on which the debtor resides, without giving him an opportunity, when practicable, to designate other property of his sufficient to satisfy the writ, the levy ought to be set aside, upon a timely application by the debtor, accompanied with a satisfactory showing of other property, subject to levy, sufficient to satisfy the execution. *Pitts v. Magie*, 24 Ill., 610. No decided case has been brought to our notice, in which it was held that a failure of the officer to notify the defendant in the execution, before levying upon his real estate, would authorize a court of equity to set aside the sheriff's sale and deed, after the expiration of the statutory period of redemption. The tendency of the decisions in Illinois, as elsewhere, is in the opposite direction. *Gardner v. Eberhard*, 82 Ill., 316; *Rock v. Haas*, 110 Ill., 528; *Davis v. Chicago Dock Co.*, 129 Ill., 180, 191.

"The failure to give the defendant notice of the levy of a writ, or of the time when his property will be offered for sale thereunder, is a mere irregularity, which he waives if he does not urge it in due time, and this urging must ordinarily be by some attempt to prevent the sale before it takes place, or to vacate it afterward and before a conveyance to the purchaser." 2 Freeman, Exec., sec. 285.

Appellant had no interest in the judgment against the appellee, and had nothing to do with any of the proceedings thereunder prior to the date of the sale. Whatever may have been the nature of

Miller's agency, in connection with the business of the appellant, it is clear that he was acting as attorney for the judgment creditor, and in no wise for the appellant, in what he did with respect to issuing and directing the levy of the execution. It has been remarked that the only evidence of the circumstances surrounding the levy is found in Miller's testimony, who stated that he put the execution in the hands of the officer, and instructed the sheriff to collect the money, if possible, out of personal property; that the officer, after investigating three or four hours, told him, Miller, that he could not find any personal property, and that he told the sheriff to levy on this real estate. He further said that he did not communicate with appellee in any manner, either before or after the levy; but that he did not know whether or not the sheriff made any demand of appellee, or personally notified the latter of the execution. Miller was under no personal duty to appellee to notify him, and it does not appear that Miller actually knew that the sheriff had not done so. As between the plaintiff in execution and himself, Miller was clearly bound to give suitable instructions to the officer holding the writ, and he would have been responsible to his client for any injurious consequences resulting from his failure to do so. But whether Miller knew of the failure of the sheriff to make demand of appellee or not, his knowledge in that regard could not be imputed to the appellant. Beyond that, mere imputed notice of the irregularity on the part of the sheriff would not furnish ground for attacking the title conveyed by the sheriff's deed. It is believed that nothing less than collusion between the officer and the pur-

chaser would justify the cancellation of the sheriff's deed for the irregularity in making the levy.

It appeared that, on the day of the sale, the deputy sheriff telephoned to Miller, who was in Cripple Creek, that he could find no bidders for the property, and asked Miller what he should do. After consulting with his wife, who was the secretary of the appellant, Miller telephoned the deputy "to bid \$100 and no more for The Victor Investment Company." Miller did not know who was present at the sale, or whether anyone was there present besides the deputy sheriff; but the latter informed him that there were no bidders. This was all the proof offered, concerning what occurred at the sale. It is strongly contended, on behalf of the appellee, upon this testimony, that the sheriff undertook to act as agent for the appellant, in bidding at the execution sale, and that that fact alone should avoid it. On the other hand, appellant's counsel argue that there was no impropriety in receiving the bid of \$100 over the telephone, provided that the officer made public outcry of the bid, at the place of sale, before striking off the property to appellant. We think that, up to this point, the weight of authority sustains the position of the appellant. There seems to have been no intention to confer discretionary authority upon the sheriff to bid for the appellant, but the amount of the bid was definitely fixed at \$100 and no more. In these circumstances, it could not be important whether the bidder was present at the place of sale, or communicated his bid over the telephone.

In *Wenner v. Thornton*, 98 Ill., 156, 169, it was said:

“Respecting the point, that Houtze acted as the agent of Wenner in purchasing, as well as the agent of the court in selling, the land, all there is of that is, that it appears that it being impossible for Wenner to attend the sale, he sent by Houtze on the morning of the sale a bid for the land of the sum of \$4,596, and Houtze struck off the land to Wenner for that sum. We think that where there was no more of an agency exercised than appears here, it is not ground for setting aside a sale. The bid sent appears to have been a definite and fixed one, without any discretion in Houtze to vary it. Wenner simply gave the trustee the bid that he was willing to make. This court gave sanction to such a transaction in *Dickerman et al. v. Burgess et al.*, 20 Ill. 266, a case of a sheriff's sale under execution upon a bid sent to him by letter. The court say: ‘Nor do we mean to be understood as objecting to receiving a bid by letter—but the officer must cry the bid, and if there be no advance on it, he would be justified in selling at the bid. The debtor has a right to insist upon all the forms.’ ”

See also 2 Freeman, Exec. (3rd ed.), sec. 292; *Brannin v. Broadus*, 94 Ky., 33.

The rest is not so easy, however, since there was no direct proof that the officer did or did not cry the bid communicated by telephone. Counsel for appellant insist that the presumption must be indulged that the officer did his duty in the premises, and that the bid was duly cried, while appellee's counsel assert with positiveness, apparently born of conviction, that the burden of showing a fair public sale devolved upon the appellant. As to this, it may be said that the execution of the sheriff's deed to ap-

pellant was alleged in the complaint, and nothing was averred or has been claimed against its *prima facie* regularity. It was and is provided by our statute, relating to the deed of the sheriff executed in pursuance of an execution sale, that "any deed so executed shall be evidence that the provisions of the law in relation to sales of land upon execution were complied with, until the contrary shall be shown," etc. Under this plain provision of the statute, and in the absence of any evidence of fraud on the part of the purchaser, it is not going too far to say that the burden was with appellee to prove such illegality or irregularity in the sale, as would suffice to overcome the presumption of legality attached to the sheriff's deed. *Bay State etc. Co. v. Jackson*, 27 Colo., 139. This being true, the evidence produced at the trial was wholly inadequate to warrant the decree of the court.

The fact that Miller acted as attorney both for the execution creditor and the purchaser at the sale was not a matter which, in itself, affected any right of the appellee. Miller did not represent the latter, in any aspect, and owed him no direct duty. If it was Miller's duty to notify the judgment creditor of the levy and sale, it was not one on which the appellee had a right to or did rely. There was no evidence to justify the assumption that it was Miller's intention, at any time prior to receiving the telephone message from the sheriff, on the day of the sale, to bid on the property, either for himself or for the appellant.

It would be more satisfactory, as a matter of feeling, if we were able to reach a different conclusion in this case, but we have no right to determine

a cause on sympathetic grounds alone, at the expense of sound legal doctrine, and so create a precedent to menace the stability of judicial sales. The appellee's want of knowledge of the execution issued under the judgment against him, and the levy and sale thereunder, could not, in any event, be attributed to the appellant. It is probably true that the officer, in making the levy, followed the usual custom of filing a certificate of levy with the county recorder, and it is a matter of presumption that a duplicate of the certificate of sale issued to the purchaser was recorded, as provided by law. It is not claimed that appellee did not have knowledge of the judgment against him, and he also knew that it was unsatisfied. His remaining in ignorance of the execution was due to inattention to his own affairs, as was also his failure to protect whatever equity there was in the family residence by taking advantage of the homestead law. It would seem, then, that he has only himself to blame for his misfortune, from which equity is powerless to relieve him. The courts are without power to arbitrarily extend the statutory period of redemption, for the purpose of relieving the hardships of individual cases, in the absence of some recognized ground for equitable interference. The attitude of the appellant, in holding to the advantage obtained through legal forms, may be characterized as hard and unconscionable, but such shortcomings are cognizable only *in foro conscientiae*, and not *in foro legis*. To sustain the decree of the district court, upon the facts appearing in this record, would be to declare the execution of a sheriff's deed, after sale under execution and expiration of the statutory period of redemption, the excuse for the

institution of a new litigation. The judgment must be reversed. *Reversed.*

Decided May 13, A. D. 1912. Rehearing denied June 10, A. D. 1912.

[No. 3444.]

FARMERS' HIGH LINE CANAL AND RESERVOIR Co. ET AL.
v. WOLFF ET AL.

Motion to remand denied on authority of *Monte Vista Canal Co. v. Centennial Irrigation Co.*, post.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. C. B. WHITFORD, Mr. HENRY E. MAY, for appellants.

MESSRS. THOMAS & THOMAS, Mr. JOHN R. SMITH, for appellees.

Motion to remand denied.

KING, J., delivered the opinion of the court.

Motion is made to remand this cause to the supreme court for the reason that the decision necessarily relates to or involves a freehold. The judgment appealed from was rendered by the district court in a statutory proceeding for permission to change the point of diversion of decreed water-rights. The facts and conditions of this cause, so far as material in considering this motion, are so nearly the same as in *Monte Vista Canal Co. et al. v. Centennial Irrigating Ditch Co.*, in which opinion was handed down at this term, that the reasons and con-

clusions therein announced are controlling, and under that authority the motion herein to remand will be denied.

[No. 3449.]

HALL V. BEYMER.

1. *EQUITY—Following Trust Funds.* Where a bank receives from a depositor, for collection, a promissory note, with directions not to place the amount to the credit of the depositor, the amount when collected is a trust fund, and in case of the insolvency of the bank, presently ensuing, the receiver of the bank will be required to pay over the amount collected, to the depositor.

That the collection is made by another bank, in a different city, and the draft for the amount is transmitted by the first bank, for its own credit, to a third bank, does not affect the question. The fund may be followed and subjected to the trust so long as it can be traced and identified.

2. — *Waiver of right by the beneficiary.* The party entitled to the money, in such case, does not waive his right by failing to demand it as soon as informed of the collection. A waiver is accomplished only by some clear unequivocal and decisive act manifesting the purpose, or conduct amounting to an estoppel.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. FRED A. SABIN, for appellant.

Mr. JOHN H. VOORHEES, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

On the 4th day of January, 1908, the district court of Otero county entered an order appointing G. M. Hall receiver for the State Bank of Rocky Ford in a case entitled *Henry M. Beatty as State Bank*

Commissioner of the State of Colorado, Petitioner, v. the State Bank of Rocky Ford, respondent. It appears from the record that The State Bank of Rocky Ford transacted business until the close of banking hours on the 31st day of December, 1907, and thereafter did not open its doors again for business.

This action is upon the part of the appellee alleging that on the 20th day of December, 1907, he delivered to The State Bank of Rocky Ford, a promissory note signed by H. W. Wyman for the principal sum of \$600 due December 24th, 1907, which with interest amounted to a total sum of \$622.85, that the note was left with The State Bank of Rocky Ford for collection, and by that bank forwarded to Colorado Springs, Colorado, where the same was paid and the amount thereafter transmitted to the State Bank of Rocky Ford. The petitioner prayed the court for an order that this be declared a special or trust fund in the hands of the receiver.

On the 17th day of October, 1908, and upon a hearing of the matter, the district court adjudged that the sum of money involved was the proceeds of a note left for collection by the petitioner, and is a trust fund, and directed the receiver to pay the same to the claimant. This proceeding is an appeal from such order.

Upon the hearing the parties entered into the following stipulation of fact:

"It is stipulated between counsel that the State Bank of Rocky Ford, received for collection December 20th, 1907, a note for \$600 from R. S. Beymer; that said note was sent to a Colorado Springs bank, and by it collected, and a draft of remittance made on

the 27th day of December, 1907, which draft was received by the State Bank of Rocky Ford on December 28th, 1907, and in turn on said date sent to The First National Bank of Pueblo, to the credit of the State Bank of Rocky Ford; that on the 31st day of December, 1907, the State Bank of Rocky Ford sent to the petitioner, Mr. Beymer, a statement of the collection of said note, advising him that they had collected the six hundred dollars, together with \$22.85 interest, less sixty-three cents exchange, leaving a balance of \$622.85; that on said date they placed to his credit on his bank book said amount."

The appellee testified at the hearing that he left the note at the bank for collection with Mr. Gooding, its president, and with directions to the president as follows:

"Q. You may state what direction you gave Mr. Gooding. A. Mr. Gooding wanted to know if I wanted to place it in as a deposit. I said no, I wanted it for myself, I wanted the collection."

He further testified that on the 30th day of December he called on the bank and inquired of Mr. Barkley, the assistant cashier, as to whether or not they had heard from the collection and was informed that they had not. He further testified that on the afternoon of the 31st, at about three o'clock, Barkley called to him and said "we have heard from that Colorado Springs collection, what shall I do with it," and that he replied, he wanted to save it, he wanted it for himself. He said that he was in a hurry, having another party in the buggy at the door of the bank waiting for him, and that he didn't wait to get the money at that time.

Upon that point, Barkley testified that he called

to Beymer, who was going by the window and said we have heard from that collection, but does not recall that Beymer said anything in reply; that up to that time he had made no entry of the item but just noticed they had received the collection. The appellee's testimony is undisputed in the record.

Appellee further testifies that on the afternoon of the 31st day of December, at the time he was advised that the collection had been made, he handed his pass book to the bank to be balanced, it being the last day of the month.

It appears from the stipulation that Beymer was given credit for the amount collected as the proceeds of the note, on the 31st day of December, as evidenced by Beymer's pass book, received by him later and handed to the officer of the bank to be balanced at about the closing hour of the day of the 31st.

It appears also from the stipulation that the note was received by the bank for the purpose of collection; that it was collected and the proceeds in the form of a draft received by the bank on the 28th day of December. It appears further from Beymer's testimony that there was special direction at the time the note was delivered to the bank for collection, that the proceeds were not to be deposited, and this appears to have been understood by the bank, for although the draft in payment of the collection was received by the State Bank of Rocky Ford on the 28th day, the amount was not placed to the credit of Beymer until the 31st day of December, the day that the bank closed its doors for business. Clearly then, from this stipulation and from the testimony without apparent contradiction, the

bank did not receive the proceeds of the note for and as a deposit, but with special instructions to the contrary, and that in all respects the bank was acting solely as the agent of Beymer in the matter of the collection and was holding the proceeds after collection, solely as the bailee of Beymer.

Much is said in appellant's brief and the argument as to the necessity of tracing this fund into the funds of the bank, but in the light of stipulation of fact we are unable to see how this is pertinent in this case, for it is stipulated "which draft was received by the State Bank of Rocky Ford on the 28th day of December, 1907, and in turn on said date, sent to the First National Bank of Pueblo to the credit of The State Bank of Rocky Ford."

Clearly, in thus having the amount of the draft placed to its credit with the Pueblo bank, there was a co-mingling of this fund with those of its own.

The principle controlling this case was announced in *First National Bank v. Hummel*, 14 Colo., 259, where it was held that so long as trust property could be traced and followed it should remain subject to the trust, and wherever trust funds were mingled with another's assets the whole would be treated as trust property, except in so far as the defaulting trustee might be able to distinguish his own property from the trust estate.

In that case the court said "Is it not clear that Everett received the fund in a fiduciary capacity? Does it not follow that the instant it passed into his hands a trust arose by operation of law, in favor of plaintiff in error? Did not the trust follow the fund when it passed to the hands of defendant in error? If it was mingled with the assets of the decedent, is

not the estate impressed with the same trust? Can it be possible that the fact of death increases a man's estate by adding thereto all property which may be in his hands? Can a man, by an abuse of trust or violation of his fiduciary relations, acquire moneys for distribution among his general creditors at his decease?" It will not be contended that the rule in case of insolvency would be different.

The doctrine in that case is reiterated by the court of appeals upon a retrial of the same matter, reported in 2 Colo. App., 571. These cases were cited and approved by the supreme court in *McClure v. La Plata Co.*, 19 Colo., 122, where the court said "It is a well settled rule that where property held in trust has been misapplied and diverted from the purpose of such trust it may be followed wherever it may be traced and subjected in its new form to the *cestui que* trust." The bank will not be permitted to take advantage of its own wrong, nor will the character of the transaction be changed by transferring the amount of the collection to its own account in the Pueblo bank, nor by wrongfully entering the amount to the credit of the appellee, and particularly as appears in this case, at a time after the bank failed and had ceased to do business as a bank.

"A bank cannot divest itself of a trust relation and assume the other at its own convenience. The transformation does not effect the depositor unless this is known by him, either by agreement or usage." 5 Cyc., 516.

"The rule is perfectly plain. The money of the real owner went to swell the assets of the bank. The bank knowingly mingled the fund of which it was

the trustee with the funds which it owned, hence the beneficiary has the right to have the whole fund impressed, with the trust in his favor." Zane on Banking, sec. 341.

Counsel contends that there was a waiver by appellee presumably by his failure to take the funds from the bank at the particular moment when he was advised that the collection had been made, and cites many authorities upon the subject of waiver.

As we read the record we fail to find any testimony whatever that may be reasonably construed to be an intent to waive any right in this respect, or to depart in the slightest degree from the original agreement and understanding at the time the note was delivered to the bank for the purpose of collection.

"It may not be necessary to show the actual intent to waive where the conduct of the party has been such as to estop him. See *Ross v. Swan*, 7 Lea (Tenn.), 467. In this case, Freeman, judge, said: 'To make out a case of abandonment or waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part.' " 28 Am. & Eng. Enc., 528.

The order and judgment of the district court is affirmed.

All the judges concurring.

Decided May 13, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3450.]

HALL V. BURRELL.

1. *SET OFF—Bank and Depositor—Receiver.* The mutual liabilities of bank and depositor are to be set off against each other, and the depositor's right to the set-off is not impaired by the bank's insolvency.

Appellant was receiver of an insolvent bank. Appellee was a depositor therein, and had a credit at the date of the failure. He had previously executed his note to the bank for a larger amount. The bank had pledged this, with other negotiable paper, to another bank, as collateral security for a loan. Appellee, reserving his right of set-off, had paid this note to the pledgee bank, and certain of the collaterals pledged by the insolvent bank had been returned to the receiver. An order that the receiver should collect the collateral so returned, and make *pro rata* payment out of the proceeds, to the appellee and other depositors similarly situated, in proportion to their several deposits, was affirmed.

2. *EVIDENCE—Agreed Case—Court Not Restricted to.* In considering the petition of a depositor in an insolvent bank against the receiver thereof, to be allowed his deposit as a set-off against his promissory note, which, reserving the right of set-off, he has paid to another bank holding it as pledgee of the payee bank, the court is not limited to the facts set forth in an agreement of counsel upon which the petition is heard. The petition being presented and heard in the cause in which the receiver was appointed, the court may take into consideration other material facts appearing by the record.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. FRED A. SABIN, for appellant.

Mr. JOHN H. VOORHEES, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

The following agreed statement presents the facts in this case:

"D. V. Burrell was a depositor of the State Bank of Rocky Ford; that at the time of the failure of said bank he had on deposit in said bank a balance of \$627.71; that prior to said date, to-wit, on the second day of October, 1907, he had made and executed to the State Bank of Rocky Ford his certain promissory note for the sum of six thousand dollars, due December 20th, 1907, interest at 10 per cent.; that prior to the maturity of said note the same, together with other notes, were by the State Bank of Rocky Ford assigned, as collateral, to the First National Bank of Pueblo, Colorado, for a loan aggregating the amount of \$56,000 made by the First National Bank of Pueblo, Colorado, to the State Bank of Rocky Ford, and for which there was assigned at the time of the closing of the said the State Bank of Rocky Ford, \$116,000 of notes; that subsequent to the appointment of the receiver, the petitioner herein, by application to the district court, was granted leave to pay said note to the First National Bank of Pueblo, Colorado, which was demanding payment of the same, without waiver of any rights of off-set which might exist in his favor; that he thereupon paid on said note three thousand dollars; that the note, when hypothecated with the First National Bank of Pueblo, was not yet due; that the debt to secure which this note and others aggregating \$116,000 were hypothecated with the First National Bank of Pueblo is not yet fully paid; that none of the collateral so hypothecated has been turned back to the receiver of the State Bank of Rocky Ford; that the balance of the collateral in the hands of the First National Bank of Pueblo, and unpaid is of uncertain value."

Upon hearing the court directed that the receiver collect and pay out of the proceeds of the returned collaterals by the First National Bank of Pueblo, appellee's deposit *pro rata* with others similarly situated, according to the amount of their several deposits. From this order the receiver appealed.

The appellant, the receiver of the State Bank of Rocky Ford, complains, first, that the judgment was rendered upon the basis of a statement of fact by the court not justified by the record. That is to say that the court recites as a statement of fact "that each of the claimants including the appellee having paid the First National Bank of Pueblo their respective notes to the State Bank of Rocky Ford," while it is agreed in the statement of facts admitted, "that he thereupon paid on said note \$3,000;" that the note having been for \$6,000 it was not paid as recited by the court in the statement entered. Counsel then contends that the court is restricted to the facts admitted in the case, and hence the order of the court, for such reason, may not be sustained. If this were a statement of the whole matter in this regard it is purely technical in this case. But the order appealed from was made in the receivership case proper then pending, and in which the court had before him all the facts bearing upon the receivership. Hence he was not confined to the stipulation for his finding that the entire note had been paid, which must have appeared from the record of the whole case in which he was at that time determining but one feature.

It was admitted by counsel on oral argument that at the time the court entered the order, the en-

tire note had been paid. If so the court had the fact before him and it was his duty to take note of it in entering the order complained of. The objection is trivial and without merit, but it is so persistently urged, that we feel constrained to refer to it. But if the court had inadvertently stated the fact as to whether all or only part of the note had been paid, it could not effect the order entered in any sense. It will be observed that the receiver was ordered to first collect out of the collaterals returned to him by the First National Bank of Pueblo, and make pro rata payments, etc. Now if the note of appellee had been returned to the receiver with only \$3,000 of it paid, certainly appellee would have been entitled to his off-set as against the unpaid portion of the note, and the receiver would be left without ground for contention at all.

It is the well settled rule in this country that mutual agreements that are due bank and depositor may be set-off as against each other, and also that the bank's authority and duty to do this is continued to the receiver, and that the depositors' defenses are not impaired by the bank's insolvency.

But the real contention of the appellant is that the court erred in holding as a matter of law, that the receiver should pay to the appellee the pro rata amount of his deposit out of the proceeds of returned collaterals coming into his hands from the First National Bank of Pueblo, after the debt to that bank had been paid. At the instant of the bank's failure, appellee had on deposit the sum of \$627.71, and at the same time the bank held appellee's unmatured note in the sum of \$6,000 which had been deposited, together with other notes owned by the

failed bank, and of the total face value of \$116,000 as collateral or to secure the payment of \$56,000 owed by the State Bank of Rocky Ford to the First National Bank of Pueblo.

It would appear from the language of the court's order, that there were other depositors in the same situation as the appellee, and that payment was ordered to be made in all of these cases, in proportion to their several deposits.

It should be stated that when the receiver was appointed the appellee filed his claim for the full amount of his deposit, and that before he paid the full amount of his note held by the Pueblo State Bank as collateral, he presented the question to the court and secured an order to the effect that such payment should not prejudice his rights in the premises.

Accepting the rule of off-set as above stated, it would seem that the action of the court in this case was both equitable and just.

Counsel for both parties assert that they have been unable to find but one adjudicated case bearing upon the question under consideration, and that is the case of *Becker v. Seymour*, 71 Minn., 394, wherein the precise question was involved. In that case the depositor had given his note for \$500 to the bank and had a deposit of \$170 at the time of the failure of the bank. This note with others, and the interest, aggregating a face value of \$616,721.69, was pledged to another bank to secure a note of the insolvent bank in the sum of \$207,964.68. The pledgee had compelled the payment of the depositor's \$500 note and afterward, and upon the payment of the pledgee's note from the insolvent bank, the re-

mainder of the collaterals was returned to the receivers. The depositor secured an order from the court for the payment of his deposit out of the proceeds of the returned collaterals, as in this case, and the order of the court was upheld by the supreme court. The reasoning of the court in that case seems sound and entirely applicable to the case at bar, and is as follows:

“Under these circumstances the respondent was justified in paying the balance of his note under protest, and seeking redress from the receivers. The result of compelling him to pay the balance of \$170.90 on his note was to increase the fund in the hands of the receivers arising from the collaterals returned by just that amount, to which neither the receivers nor the general creditors have any equitable claim, for the reasons already stated. If the pledgee had recognized the equity of the respondent, and had not enforced payment of the balance due on the note, but collected the amount thereof from the other collaterals, the note would have been returned to the receivers; and, while the aggregate amount of collaterals returned would not have been thereby changed, yet the fund to be realized by the receivers would have been reduced \$170.90 because when the note came back to the receivers the unpaid balance thereon would have been at once canceled by the respondent's deposit. But instead of returning this note, as it ought to have done, the pledgee returned other collaterals of equal amount, against which there was no offset, so far as the record discloses; hence there is no escape from the conclusion that the fund in the hands of the receivers arising from the returned collateral is \$170.00 larger than it would have

been if the respondent's equity in the premises had been regarded. In its last analysis, this case is simply one where the receivers have obtained, not from the assets of the insolvent, but from the respondent, through and by the act of the pledgee, \$170 which does not equitably belong to them, or to the general creditors. If the receivers are required to repay this sum to respondent, a wrong will be righted, and no injustice done to others. Equity regards that done which ought to have been done, and in this case it will treat the unpaid balance of \$170 due on the respondent's note as offset by his deposit of equal amount, and regard his payment of \$170 on the note, as against the receivers, as having been made to them, through and by the act of the pledgee, under protest and without consideration, and require them to repay the amount from the fund in their hands arising from the returned collaterals, which was increased pro tanto by such payment."

Judgment is affirmed.

All the judges concurring.

Decided May 13, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3452.]

HALL V. HARDY ET AL.

Judgment affirmed on the authority of *Hall, Receiver, v. Burrell*, post.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. FRED A. SABIN, for appellant.

Mr. JOHN H. VOORHEES, for appellees.

Presiding Judge SCOTT delivered the opinion of the court.

This case involves the same question as in the case of *G. M. Hall, Receiver of the State Bank of Rocky Ford v. Burrell*, decided at this term of court, and upon the authority of that case the judgment is affirmed.

All the judges concurring.

[No. 3453.]

HALL V. RAMSEY AND BYARS.

EQUITY—*Following Trust Funds.* Appellees entered into a written contract with one Smith, cashier of a bank, for the purchase of certain lands. Part of the purchase money was represented by a promissory note of \$6,900, payable in monthly installments of not less than \$100; appellees were to receive the title unencumbered. Smith acted for the bank, which was the equitable owner of the lands, and Smith's deed to appellees was deposited in the bank, as an escrow. Appellees made monthly payments, according to the terms of their promissory note, until no more than \$700 remained due thereon, for both principal and interest. The bank then closed its doors and a receiver was appointed. At the time of appellees' purchase the property was subject to an encumbrance of \$2,500, but of this appellees had no notice. After the purchase price, less by the amount of the encumbrance, had been discharged, Smith issued cashier's checks for the amounts paid, which were attached to the agreement of purchase and the deed to appellees so deposited in escrow. These payments amounted to \$2,000. Held that no trust relation existed as to this amount and that the court wherein the receiver was appointed was without authority to order that, upon payment of the residue of \$700, the receiver should discharge the encumbrance and deliver the deed to appellees.

But held that the appellees should be declared general creditors of the bank for the amount.

A sum paid by appellees to the receiver was ordered returned to them.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. FRED A. SABIN, for appellant.

Mr. JOHN H. VOORHEES, for appellees.

Presiding Judge SCOTT delivered the opinion of the court.

This is an appeal from an order of the district court of Otero county allowing the claim of appellees as a trust fund, in the matter of the receivership of the State Bank of Rocky Ford. There is no substantial conflict in the testimony and from which we gather the following facts:

On the 15th day of December, 1902, the State Bank of Rocky Ford was the owner of a lot and business building in the city of Rocky Ford, subject to an encumbrance of \$2,500.00 secured by trust deed on the premises. The title to the premises had been taken and was then held in the name of E. J. Smith, cashier of the bank.

On that day and acting for the bank, Smith entered into a written contract with the appellees for the sale of the premises. It was understood by all parties that while the title was in Smith and the contract was made in Smith's name, yet the property was that of the bank and that the contract was for the bank. The purchase price agreed upon and which agreement was denominated an "escrow agreement," was \$7,600.00. This was to be paid as fol-

lows: \$350.00 cash, \$350.00 on the 2d day of January, 1903, and a note of \$6,900.00 with interest at eight per cent. per annum, due on or before 69 months from date, the principal and interest to be paid in monthly installments of not less than \$100.00 each month. A warranty deed for the premises, in terms conveying the property to appellees free and clear of all encumbrances, was executed as of even date with the agreement and deposited together with it with the State Bank of Rocky Ford.

The agreement further provided that appellees were to have possession of the premises on January 2d, 1903, and were to pay all taxes and to keep the building on the premises insured in a sum not less than \$4,000.00 in favor of the vendor. On the 18th day of December, 1902, Smith executed his note to the bank in the sum of \$5,100.00 payable in 69 months. On the face of the note were written the words "Ramsey and Byars deal." Smith testifies that this note was for the purpose of convenience in carrying the account on the books of the bank. The two cash payments of \$350.00 each, amounting to \$700.00 and the note for \$5,100.00 make a total of \$5,800.00, a discrepancy between that and the purchase price of \$1,800.00. What became of this is not clear from the record.

On the 31st day of December, 1907, at the time of the failure of the bank, the appellees had paid all of the agreed purchase price except the total sum of \$700.55 due as principal and interest. The encumbrance of \$2,500.00 on the property had not been discharged by the bank. But when all of the purchase price in excess of the amount of the encumbrance had been paid, the monthly payments were then re-

ceived by Smith, who issued the bank's cashiers' check in each instance and attached these to the escrow agreement.

These payments so made and for which such cashiers' checks were issued, amounted at the time of the failure of the bank, to the total sum of \$2,000.00. The monthly payments were credited alike on the note of appellees to Smith and the note of Smith to the bank. The petition of appellees prayed the court to declare this sum of \$2,000.00 a trust fund and that upon payment by appellees of the sum of \$700.55 due on the purchase price, that the receiver be ordered to pay off the \$2,500.00 encumbrance and deliver to appellees the said warranty deed, for the premises, then held by him. This was in substance the order of the court and of which the receiver complains.

It appears also that prior to the filing of the petition in this case the appellees had paid to the receiver the sum of \$125.00 which he accepted and still retains.

It will be seen that the only question for determination is as to whether or not the two thousand dollars paid by the appellees to the bank, under their contract of purchase, and for which cashiers' checks or certificates were so issued, constituted a trust fund within the meaning of the law.

Counsel submitted elaborate briefs and have made extensive oral arguments upon the questions of tracing trust funds, of estoppel, of agency and of the statute of frauds, all of which seem to have no place in the case, as we understand the facts.

It is contended by the appellees:

1. "That the money paid by appellees on their contract that are represented by cashiers' checks, is a trust fund to be applied in paying for the property and paying off the incumbrance thereon.

2. This money was turned into the general funds of the State Bank of Rocky Ford and became a part of its assets."

The court seems to have adopted this theory of the case and to have rendered judgment accordingly.

It is quite clear that if the appellees have any claim at all it is under and by virtue of their contract with the bank using the name of Smith, for the purchase of the premises. This is the contention of appellees as set out in their petition and in the briefs.

If then the contract was in fact the contract of the bank, though made in Smith's name, then there can be no element of agency or trust. In such case the bank agreed to sell, and Ramsey and Byars agreed to buy. The moneys paid by the latter were simply payments to the bank upon their contract with the bank. It may be presumed that it was the purpose of the bank to pay the encumbrance of \$2,500.00 when it had received the full consideration of the contract, and thereafter to deliver the deed. But there is no evidence as to any such agreement between appellees and Smith, or any other officer of the bank.

The appellees seem to have made the monthly payments from first to last as agreed in the contract. It is not contended by appellees, that they even knew cashiers' certificates were being issued,

nor does it appear that there was any subsequent or different agreement than the original.

We are unable to find in the record any evidence tending to show that at the time of the contract of purchase, or at any time before the failure of the bank, either Ramsey or Byars knew that there was an encumbrance on the premises. It is not referred to in the written agreement, nor in the warranty deed executed at the time. The petition of appellees recites:

"Your petitioners further allege that they are now informed and believe and so state the fact to be, that said property is now, and was at the time of said sale, subject to a certain encumbrance in the sum of twenty-five hundred dollars (\$2,500.00), witnessed by one promissory note for said sum of twenty-five hundred dollars (\$2,500.00) dated January 11, 1899, payable to Thurlow, Hutton and Williams on or before January 11, 1902, together with interest thereon at the rate of eight per cent. (8%) per annum, interest payable semi-annually, secured by deed of trust upon said property, hereinbefore described, which said deed of trust was duly recorded in the office of the county clerk and recorder of Otero county, Colorado; that no part of said note has been paid save and-except the interest thereon, and the same has been extended from time to time; that there is now due upon said note, as interest, the sum of one hundred forty-one dollars and twenty-five cents (\$141.25) which together with the principal of said note makes the amount due thereon two thousand six hundred forty-one and 25-100 dollars (\$2,641.25)."

From this allegation, and from an examination

of the agreement as well as the deed, it would seem that appellees were without actual knowledge of any encumbrance on the property prior to the failure of the bank, and that they trusted and relied solely on the agreement of the bank to deliver to them a deed for the premises, unencumbered, upon the completion of the payments agreed by them to be made.

The action of the bank alone, in issuing cashiers' certificates for certain payments made under the state of facts here, can create no fiduciary relationship between the bank and the appellees. The appellees are simply unfortunate in that they are the victims of misplaced faith and confidence in the integrity and stability of the bank with which they contracted.

Whether or not appellees may be held to be general creditors is not without difficulty, but it would seem that the issuance of the certified checks may be said to amount to an admission of indebtedness or liability under the contract, when considered with the whole conduct of the bank in relation thereto, and it would seem that equity should decree that they be declared general creditors to that extent. The question is not raised or discussed in the briefs.

We can find no legal basis, under the state of facts presented, for the order of the court holding the sums of money paid by appellees and for which cashiers' checks were issued, to be trust funds and entitled to preference, and must therefore hold such order to be error.

To that extent the order of the court is reversed with instruction that the order be further modified in that the sum of \$125.00 paid by appellees to the receiver be repaid to them.

Reversed with instructions.

All the judges concurring.

Decided May 13, A. D. 1912. Rehearing denied
July 8, A. D. 1912.

[No. 3454.]

HALL, RECEIVER, v. ROCKY FORD TRADING CO.

Judgment affirmed on the authority of the opinion in *Hall v. Burrell*, ante.

Appeal from Otero District Court. HON. J. E.
RIZER, Judge.

Mr. FRED A. SABIN, for appellant.

MESSRS. GLENN & GOBIN, for appellee.

Presiding Judge SCOTT delivered the opinion of
the court.

This case involves the same question as in the case of *G. M. Hall, Receiver of the State Bank of Rocky Ford v. Burrell*, decided at this term of court, and upon the authority of that case the judgment is affirmed.

The order entered by the court below in this case, has inadvertently referred to the amount of the notes involved in the several cases now before the court, instead of the amount of proved claims on deposits. In this case, and all of the cases considered at this term, it was clearly intended that the *pro rata* payment ordered to be made, referred to the deposits or claims of each of the claimants and not to their several notes. The order of the district court

should be corrected to correspond with this suggestion.

denied

All the judges concurring.

Decided May 13, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3455.]

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NORTON'S ESTATE V. McALISTER.

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1. JUDGMENT—*When a Bar.* Under the provisions of the code (Rev. Code, secs. 183, 184) a judgment of non-suit, for the failure to establish by testimony a case sufficient to go to the jury is no bar to a subsequent action upon the same cause of action.

2. CONTRACT—*Meeting of Minds.* Promise by an aged and infirm gentleman to his niece, who at his request has assumed the position of his housekeeper, that he will convey certain real estate to her, there being no agreement that it shall be in full satisfaction of the services to be rendered by her, is no bar to an action for the value of such service.

3. — *Modification of Contract.* A niece enters into the service of her uncle as his housekeeper. In her action against his estate for the value of her services it was contended that by her agreement, she was to remain with him during his life time, and that she had broken her agreement by contracting marriage and quitting his household before his death. But it appearing that the uncle had consented to the marriage, and thereafter as well as before had frequently expressed an intention to reward his niece, this was held to evidence a modification of the contract by mutual agreement.

4. — *Contract for Personal Services—Breach—Quantum meruit.* Agreement by uncle to vest his niece with certain real estate, either by conveyance or will, in consideration of personal services rendered to him. He dies without performing the contract. The niece may recover against his estate the value of her services.

5. LIMITATIONS—*When the Statute Begins to Run.* Where by agreement personal services are to be compensated only at the death of the party receiving them, the action accrues upon his death, and the statute runs from the same date.

Appeal from Denver District Court. HON. GREELEY
W. WHITFORD, Judge.

Mr. GEORGE W. DUNN, Mr. B. C. HILLIARD, Mr.
J. R. ALLPHIN, for appellant.

Mr. JOHN HIPPI, Mr. W. W. WHITE, for appellee.
CUNNINGHAM, Judge.

This appeal is prosecuted from a judgment of the district court in favor of appellee, plaintiff or claimant below, based upon a claim which she filed in the probate court against the estate of Samuel B. Norton for services rendered the said Norton during his lifetime.

The following are the facts which are either conceded or not disputed seriously: In 1897, Dr. Samuel B. Norton, then residing in this city, wrote several letters to appellee, who was then residing in Chicago, urging her to come to Denver and make her home with him, for the purpose of taking care of him in his declining years, he then having reached an advanced age, and being at the time also in ill health. Appellee was a niece of Dr. Norton, and at that time unmarried, her maiden name being Rose A. Wheeler. After receiving three urgent letters from her uncle, appellee came on from Chicago to Denver. It appears that no definite arrangement had been made as to her compensation prior to her arrival here. Shortly after appellee's arrival, her uncle stated to her that if she would take care of him in his declining years he would in some way convey to her a house and lot in North Denver, which the doctor then owned. There is nothing in the record which shows specifically that Miss Wheeler ac-

cepted this offer, unless it be that from the fact that she remained with him for five years, without any more definite understanding, it may be inferred that she assented thereto. Whatever the arrangement may have been, appellee remained from 1897 to 1902 at the home of Dr. Norton. There is no dispute that he was sorely in need of the kindly care and attention which, as nurse and housekeeper, his niece bestowed upon him. In 1902, five years after having taken up her residence at her uncle's home, Miss Wheeler was married to H. D. McAlister, and thereupon took up her residence with her husband on Race street, in the city of Denver, at no great distance from the home of her uncle. Dr. Norton appears to have freely consented to the marriage of his niece with McAlister, who had for a long time been a neighbor and friend of the doctor, and the most cordial relations appear to have continued to exist between Mr. and Mrs. McAlister and Dr. Norton down to the date of the doctor's death in 1907. During the five years succeeding the marriage of Miss Wheeler, it was a custom of the doctor to go frequently to her new home, or to be taken there by Mr. McAlister, and return to his own home after he had spent a portion of the day thus visiting with the McAlisters. In like manner Mrs. McAlister visited her uncle at his home from one to three times a week, for the purpose of keeping a general superintending care over him for his benefit, and general comfort. She often took food specially prepared from her own home to him, and she was with him during his last illness, and down to within a few hours of his death, which occurred in the night, a few hours after Mrs. McAlister had returned to her

home for a period of rest. The record shows that Dr. Norton continued throughout the whole ten years immediately succeeding the arrival of appellee from her home in Chicago, and down to the date of his death, to recognize and acknowledge his obligation to her, and he expressed to various persons, on divers occasions, his intention to recompense her therefor. He thus manifested his purpose frequently after Mrs. McAlister's marriage. He apparently had no great amount of ready cash or personal property; at any rate, it is shown that he stated that he had none, and always indicated his intention to compensate his niece by willing or transferring property to her, so that she would come in possession of it after his death. Following Dr. Norton's death, no will, contract deed or other instrument was found, whereby he had sought to discharge his obligation to his niece. Thereupon she filed her claim with the probate court for services rendered from 1897 to 1902 (the last date being the date of her marriage). This claim was contested by the administratrix, the doctor's wife, and a formal trial was entered upon to a jury. At the close of Mrs. McAlister's testimony, offered in support of her claim, the record shows that the attorneys representing the estate moved for "judgment as of non-suit, which is argued by counsel, at the conclusion of which, and being fully advised in the premises, it is considered by the court that the said motion be and is hereby granted, and that judgment of non-suit be and it is hereby entered herein," so reads the record of the probate court on the hearing of the first claim. (A similar claim, to which we shall presently advert, was filed later.) Thereupon the claimant prayed and was al-

lowed an appeal to the district court from the non-suit entered at the request of counsel for the estate on the hearing of the first claim. When the case was called for hearing in the district court, the attorneys representing the estate promptly moved, "that this appeal be dismissed and this cause remanded to the county court," basing their motion upon the representation then made that the claim had been non-suited in the county court, and claimant had not, "within ten days thereafter, or at any other time or at all, applied to the said honorable county court to have set aside and vacated said judgment of non-suit." This motion was granted by the district court, and the following order entered in connection therewith: "It is considered by the court that the appeal herein be, and the same is, hereby dismissed, and that the judgment of the county court stand in full force and effect, and that this cause be remanded to the said county court for such other and further proceedings as shall be necessary to the final execution of the judgment of said county court." This order of dismissal was entered in the district court on December 2, 1907. Appellee thereafter, and on January 20, 1908, filed a second statement of her claim against the estate in the county court, which second claim appears to have been based upon the same services as those included or covered by the first claim, disposed of as above stated, with the addition that she claimed \$1,000 for services which she rendered Dr. Norton subsequent to her marriage. This claim came on for hearing in the county court, and was likewise disallowed in that court, but upon appeal to the district court the claim was allowed in the sum of \$2,020, and it is

from this allowance or judgment that this appeal is prosecuted.

Appellant's contentions are:

(a) That the action of the county court in granting the motion for judgment as of non-suit interposed by the estate at the conclusion of the claimant's testimony at the hearing on the first claim, and the action of the district court in thereafter dismissing the appeal from the county court (not having been taken to the supreme court for review) constituted a final adjudication of plaintiff's rights to recover, at least for all services rendered prior to her marriage.

(b) That whatever services plaintiff rendered Dr. Norton were performed under a specific contract whereby she was to receive, by will, the North Denver property, providing she remained with and cared for him until the time of his death. Therefore, having voluntarily quit his employ, she thereby violated or abandoned the contract, and may not recover anything whatever for such services as she did render.

(c) That if plaintiff is entitled to recover, *quantum meruit* is not her remedy, and she can only recover in an action either for specific performance, or in an action on the contract for damages, in which her measure of damages would be the value of the North Denver property.

(d) That claimant's claim is barred by the statute of limitations, appellant's contention on this point being that whatever right, if any, claimant had to recover for services rendered prior to her marriage, accrued at the time of her marriage, January 15, 1902. Therefore, the appellant says that the sec-

ond claim, which was filed January 20, 1908, was filed a few days more than six years after plaintiff's cause of action thereon had accrued.

1. It will be seen that the facts in this case and those under consideration in *Tucker v. Tucker*, recently decided by this court, and reported in 121 Pac., 125, and, in many respects, strikingly similar.

As to the plea of *res adjudicata*, it will be remembered that the first claim was disposed of in the county court by granting a motion for a non-suit interposed by the estate at the conclusion of claimant's testimony, and without any proof having been offered by the estate. Such a judgment is not *res adjudicata* upon the merits and cannot be plead as a bar to another suit upon the same cause of action by the same parties.

D. & R. G. R. Co. v. Iles, 25 Colo., 19. *Hallack v. Loft*, 19 Colo., 80. *Russell v. Rolfe*, 50 Ala., 56.

In the latter case it is said.

"A non-suit is no bar to another action for the same cause unless made so by statute."

Our statutes not only have not made a non-suit a bar to another action, but on the contrary, sections 183 and 184 of our code (R. S. 1908), plainly indicate a contrary intention. The non-suit in the case now under consideration, was granted under the fifth subdivision of section 183, which reads as follows:

"An action may be dismissed or a judgment of non-suit entered in the following cases * * *
Fifth—by the court upon the motion of the defendant when upon the trial the plaintiff fails to prove sufficient case for the jury."

Section 184 reads:

"In every case other than those mentioned in the last section, the judgment shall be rendered upon the merits."

In *Wood v. Ramond*, 42 Calif., 145, it is said:

"A non-suit claimed on the motion of the defendant is equivalent in its operation on the action, to a dismissal with the consent of the defendant."

From the above authorities it would seem clear that appellant is not in a position to invoke the doctrine of *res adjudicata*.

2. The second contention of appellant will next be considered. We are not disposed to think that the record warrants the conclusion that there was a hard and fast contract entered into between the claimant and Dr. Norton, whereby he was to give, and she was to receive, as full compensation for her services, the North Denver property. In the case of *Porter v. Dunn*, 131 N. Y. Court of Appeals, 314, a situation strikingly similar to that here under consideration was before the court. The conclusion reached in that case strongly supports our views that there was no contract made in this case, and that the statements of Doctor Norton at or about the time the claimant entered upon her duties, of his intention to remember her in his will, or to convey a certain piece of property to her, does not foreclose or bar her right to maintain this action for the value of her services. We shall not prolong this opinion by any lengthy quotations from the New York case, but content ourselves with the following:

"He (the deceased) may have spoken in good faith, while Mrs. Porter listened and believed and probably hoped; but where are the elements of any agreement, or how does the promise of a testator's

gift, not performed, operate to restrict the plaintiff's right to recover for the value of his wife's services (the husband brought the suit) and how can such promise tend to prove or affect the reasonable value of the services after the same have been rendered? I do not think that any inference can be drawn from the fact of a promised gift by will, except that of a purpose to enlist and retain the services of the wife and the attention of the family."

It is true that the administratrix testified that a contract was drawn up and the name of the individual who prepared it was given, but she did not testify that the claimant signed the contract, nor was any such writing produced on the trial, nor was any demand made for its production. Furthermore, there is testimony in the record to the effect that Doctor Norton frequently told his niece and others, both before and after her marriage, that it was his purpose to convey, by will or otherwise, the North Denver property to her, but we discover no testimony to show that he ever stated to her, or anyone else, that this would be her full compensation, or that she must remain with him until his death in order to receive that, and failing to so remain, she would receive nothing.

But, even if it be granted that a contract, such as that which is insisted upon by appellant, was entered into, it does not follow, nor do we think the evidence discloses, that the same was broken by appellee. By the mutual consent of both parties to the contract, if there was a contract, it was modified to the extent of permitting the claimant to establish a home of her own, and to thereafter render services of a somewhat different character from those that

she was rendering prior to her marriage. In all other respects the contract appears to have remained the same. The time of payment was always considered by the doctor as co-incidental with his death, and there is nothing to indicate that Mrs. McAlister entertained a different understanding.

3. If there was a contract, then Doctor Norton failed to observe the same, inasmuch as he died without having conveyed the North Denver property to his niece or made any provision whatever for her compensation. Under such circumstances Mrs. McAlister was not bound by the contract, or any feature or condition of it.

In *Miller v. Lash*, 85 N. C., 51, at 54, it is said:

"The authorities cited in the argument for the plaintiff seem to establish the proposition that where personal services are performed by one person for another during life, under a contract or mutual understanding, fairly to be inferred from their conduct and declarations and the attending circumstances, that compensation therefor is to be provided in the will of the party receiving the benefit of them, and the latter dies intestate, or fails to make such provision, the subsisting contract is then broken, and not only will the action then lie for the recovery of their reasonable value freed from the operation of the statute (of limitations), but it could not be maintained before."

The right of appellee to maintain her action on a *quantum meruit* also finds support in *Snowden v. Clemons*, 5 Colo. App., 251.

4. Was appellee's claim barred by the statute of limitations? From the record in this case, and from the quotation just made from *Miller v. Lash*,

supra, it would appear that this question must be answered in the negative. There is ample evidence in the record to support the conclusion that it was the understanding of both parties to the contract that the compensation to be paid appellee, as we have already indicated, would only become due and payable upon the death of Doctor Norton. The claimant so testified specifically, and there is evidence to indicate that such was the doctor's understanding. Hence it would follow that her right of action did not accrue until the death of the doctor, and that the plea of the statute of limitations can not be allowed.

The judgment of the trial court will be affirmed.

Affirmed.

[No. 3457.]

COLORADO SPRINGS GAZETTE CO. v. SIMMONS.

1. PLEADINGS—*Construed*.—In an action by servant against master the complaint alleged that a certain machine maintained in the master's establishment for trimming type-metal, operated by electricity, was in defective condition; that the insulation thereof, and of the wires attached to it, was so defective as to permit the electrical current to be transmitted to any one coming in contact with any part of the machine; but it was not alleged that this condition was due to negligence on the part of the defendant. In another paragraph it was alleged that it was the duty of the plaintiff, on occasions specified, to remove the pieces of metal which accumulated about the machine; that on the occasion of the injury defendant had negligently left the current turned upon the machine, and thus increased the danger, to any one coming near it; that while the machine was defective and out of order, and the current passing through it, plaintiff, while engaged in his duty aforesaid, came in contact with the machine, and sustained the injury complained of. Held that the complaint grounded the action not upon the defective

condition of the machine, but upon negligence in failing to turn off the current.

Elkton Co. v. Sullivan, 41 Colo., 241; *Denver Co. v. Walters*, 39 Colo., 301, distinguished.

2. MASTER AND SERVANT—*Master's Duty to Warn and Instruct Servant of Danger*.—If the service is attended by unusual risks, not obvious, and presumptively not within the knowledge of the servant, the master having knowledge thereof, is under duty to warn servant. If by reasonable care the master would have known of such danger, he is chargeable with knowledge thereof.

A man of limited education was employed as janitor in the establishment of a company publishing a newspaper. It was part of his duty to clear up, daily, metal scraps accumulated about a cutting machine which was operated by electricity. He had no acquaintance with machinery operated by electric power. No warning was given him of any danger to be apprehended from the current. Defendant's employees who operated the machine were entirely familiar with these dangers, and it was their custom whenever required to go under the machine, to turn off the current. On the occasion in question the machine was not in motion and nothing suggested any danger; but the current had not been turned off, and plaintiff in passing about it in the discharge of his daily duties, came in contact with the electrified surface and received a serious injury. It was held that the humble calling of the plaintiff should have suggested to the master the servant's ignorance of electricity and its dangers, and that under the circumstances of the case there was an absolute duty upon the master to instruct the servant, at the time of his employment, of the dangers to which he might be exposed, and to avoid contact with any part of the machine.

3. — *Servant's Assumption of Risk*. The servant is not under duty to inspect the machine about which he works, or the place in which he works, to discover defects which are not obvious.

4. — *Contributory Negligence*. Is a question for the jury.

5. INSTRUCTIONS, as to the duty of the master towards the servant and his liabilities, commended.

Appeal from El Paso District Court. HON. J. W. SHEAFOR, Judge.

Mr. HORACE G. LUNT, Mr. ORLANDO B. WILLCOX,
Mr. MICHAEL B. HURLEY, for appellant.

MESSRS. CHINN & STRICKLER, MR. J. ALFRED RITTER, for appellee.

HURLBUT, J.

Action by appellee (plaintiff below) against appellant (defendant) for injuries sustained while in defendant's employ.

The evidence tends to show that on August 25, 1907, defendant employed plaintiff in its printing establishment as janitor, and that among other duties assigned him was that of daily sweeping out a room known as the "ad" room, in which was located an electric type-metal cutting machine, to which was attached a saw used in trimming the type-metal for the linotype machines. The scraps or trimmings fell to the floor under the machine, and plaintiff was required to remove them daily. While he was engaged in removing these scraps, on August 29th, his head came in contact with the machine, and he received serious injuries from the electric current passing through the machine. The machine had a base of about eighteen inches in diameter, and extended up in cone shape to the height of a man's waist. On top of the pedestal was a platform upon which the metal was placed in order to be moved against the saw to be trimmed. About half way up the pedestal was a lever which turned the current on or off from the machine. Under the said top was a starting box, near which was a lever which moved to the right or left, to start or stop the saw as desired. It was the custom of the employees to leave the switch on the pedestal open when quitting work, thus permitting the current to pass into the machine. No evidence was offered by defendant at the

trial. There is no evidence that any one saw plaintiff just at the moment of the accident, but he was discovered by defendant's employees almost immediately thereafter. Smoke was seen by them, coming from the machine, and at the same time they detected a disagreeable odor as of burning flesh. One employee was only five feet from plaintiff when he was injured. Plaintiff's head was held tight against the starting box by the electric current, and fell away only when the fuse was jerked out of the fuse box on the wall. The evidence is undisputed that plaintiff did not know the cutting machine was operated by electricity, nor had he been informed by defendant of that fact, neither had he in any way been cautioned as to the necessity for care on his part in picking up the scraps from around the machine, nor of any danger connected therewith.

As we read the evidence it is improbable that the accident would have occurred had the current been turned off at the switch in the pedestal when the other employees ceased work for the day.

Appellant contends that grave error was committed by the trial court in giving certain instructions to the jury and in refusing to give others requested by it.

The jury, among other things, were instructed that there was no presumption that the defendant was negligent; that before plaintiff could recover they must find, from a preponderance of the evidence, that the injuries sustained by him were proximately and directly the result of the negligence of defendant; that even if they found the defendant guilty of negligence, still, if the plaintiff could have avoided the accident by exercising ordinary care,

the verdict should be for defendant; that plaintiff was to be regarded as having assumed all risks naturally and reasonably incident to the service in which he was engaged, and those arising from dangers which were open and obvious, or which would have been known to him had he exercised reasonable care; that, in order to entitle plaintiff to recover on account of defendant's failure to instruct him in regard to his duties or the dangers relative to said machine, he must establish, first, that defendant was chargeable with actual or constructive knowledge of the risk or danger existing, and that plaintiff was likely to be injured by coming in contact with the machine, second, that at the time of the injury plaintiff did not know and could not have learned by exercise of ordinary care that danger or risk existed, third, that defendant knew or ought to have known that plaintiff was excusably ignorant of the risk, and by reason thereof was exposed to abnormal hazard; and that it was the duty of the master to exercise ordinary care in seeing that his servants were provided with a reasonably safe place in which to work, and to exercise the same care in maintaining such place in a reasonably safe condition, but that such duty does not amount to warrant of perfection in such places, or a guaranty on defendant's part of absolute safety, etc.

If these instructions are measured by the authorities cited by appellant it will be found that they are well within the law as therein laid down.

The record indicates that the lower court paid close attention throughout the trial and exercised a high degree of care in conducting the proceedings, and particularly to the settling of the instructions.

In fact defendant's rights throughout appear to have been carefully guarded. A careful perusal of the record and briefs convinces us that the court's rulings are supported by reason and authority.

Appellant also contends that the complaint as drawn founds the action solely upon the statement that the cutting machine was in a defective condition and out of repair, and that by reason thereof defendant was negligent and the injury to plaintiff occurred. Were this the case appellant's position would be sound, and a reversal of the judgment would necessarily follow. But on reading the complaint we find counsel are in error in assuming the facts to be as claimed. In paragraph four of the complaint it is alleged that prior to and after plaintiff's employment the cutting machine had been in a defective condition and out of repair, that the insulation thereof and wires attached thereto were so defective as to permit the current of electricity used in operating same to be transmitted to any one coming near or in contact with any part of the machine, but nowhere in the paragraph is it alleged that this constituted negligence on the part of defendant. In paragraph six, however, it is alleged that it was the duty of plaintiff, every afternoon, after employees ceased work, to remove the pieces of metal filings from around and under the machine; that while he was so engaged on the afternoon of August 29th, defendant had not turned the current off in said machine, but had carelessly and negligently left the same turned on, thereby causing a dangerous current of electricity to pass through it; that defendant had thereby, negligently and carelessly, greatly increased the hazard and danger to any one coming

near or in contact with same; and that, while the machine was defective and out of order as stated, and while the current was passing through the same, plaintiff, while performing his duties, came in contact with the machine and sustained the injuries of which he complains.

Appellant calls our attention to the two following cases. In *Elkton Con. M. & M. Co. v. Sullivan*, 41 Colo., 241, it was alleged in the complaint that the negligence of defendant consisted in permitting a defective jog to remain in the shaft at a certain point; that the cage struck said jog in ascending the shaft and jarred a piece of steel from the arms of the deceased, which caught in the side of the shaft and threw him against the cage and killed him. The evidence showed that the accident did not occur at the jog, that the cage was running smoothly at the time, and that the injury occurred by reason of the steel slipping out of defendant's hand. The court held that "in an action for negligence, the plaintiff must be confined to the acts of negligence alleged and the results thereof whereby injury was caused as stated in the complaint."

In *Denver Con. E. Co. v. Walters*, 39 Colo., 301, it was held that plaintiff could not allege negligence in defendant for not properly insulating wires leading into a dwelling house, and sustain the action by proving the wires were not established in a safe and proper place, holding to the same rule announced in the *Elkton* case, *supra*.

We do not think these cases are in point. The evidence in the case at bar was clearly applicable to, and tended to support, the charges of negligence stated in the complaint.

Appellant also contends that under the circumstances of this case the law imposed no duty on defendant to instruct plaintiff as to his duties or as to any probable danger which might exist in the performance thereof. The law imposes a well recognized duty on the master to instruct or warn the servant as to his work where danger attends the performance thereof. But this rule is not applicable in all cases of employment. If the services to be performed, and the place of their performance, are subject to unusual risks or dangers, which are not obvious, but such risk or danger is known, or by the exercise of reasonable care on the part of the master should have been known to him, and a reasonable presumption exists that the risk or danger would not be reasonably within the knowledge of the servant in the performance of his duties, then the rule obtains. The general rule applicable to the subject is well stated in sec. 141, vol. 1. Labatt, Master and Servant, viz.:

“It is the duty of the master having control of the times, places and conditions, under which the servant is required to labor, to guard against probable danger in all cases in which that may be done by the exercise of reasonable caution. He is therefore negligent if, in the ordering of his business and the selection of his plant, he fails to provide for contingencies which are likely or unlikely to occur. He is bound to take into account the limits of the mental and physical capacity of his employees. This obligation in some instances can only be discharged adequately by properly instructing the servant. * * * He is also deemed to fall short of the required standard of care if he leaves fixed objects in such a

position that, although not ordinarily dangerous, some particular class of employees would be injured if a certain conjunction of circumstances; reasonably to be anticipated in the course of their employment, should intervene," etc.

To the same effect, sec. 4055, vol. 4, Thompson on Negligence.

In the case of *Denver Tramway Co. v. O'Brien*, 8 Colo. App., 74, the court approves of the following rule:

"It was the duty of the appellant to provide premises that were reasonably and ordinarily safe for the performance of the work which the appellee was employed to do; or if there were hidden or lurking dangers connected with the performance of such work, known to the company, and unknown to him, it was the clear duty of the company to inform him of the existence of such danger."

These authorities are pertinent to the facts of this case. The court's instructions on this question were unusually clear and sound.

The plaintiff, a man of limited education, pursuing a menial calling (which of itself should have suggested a lack of knowledge of electricity or general business and commercial operations), was assigned the duty of daily cleaning up metal scraps from under and around an electric cutting machine. No part of it was in motion, and nothing about it in repose would suggest to him any danger or risk whatever. The evidence is undisputed that he had never before worked around machinery run by electricity and did not know that this machine was so operated; nor had he any warning or instruction from defendant as to avoiding contact with any part

of the same while cleaning up the scraps. Under these circumstances, it certainly cannot be said that the law would presume this simple servant to be possessed of sufficient intelligence or experience to realize or appreciate that this motionless, inoffensive looking machine was charged with a silent, potent fluid, which might mean death or serious injury to any one coming in contact with it. On the other hand the admitted facts seem to justify a conclusive presumption of law that, under the circumstances of this case, it was the absolute and unqualified duty of defendant to have warned plaintiff at the time of his employment of the danger existing, and to have specially instructed him to avoid contact with any part of the machine while cleaning up the scraps from under it. The evidence is uncontradicted that even the employees of defendant, while operating the machine, turned off the current at the pedestal when it became necessary for them to go thereunder for the purpose of releasing the machine from the accumulated trimmings which seemed to have impeded its operation from time to time. Defendant for a long period prior to the accident had operated this machine through employees having knowledge of the methods and agencies used in and about such operation.

The law is well settled in this state that the master shall at all times use reasonable care in providing reasonably safe machinery and appliances for the use of its servants, as well as a reasonably safe place for the performance of their duties.

Grant et al. v. Varney, 20 Colo., 329. *Wells et al. v. Coe*, 9 Colo., 159. *Colorado F. & I. Co. v. Gardner*, 121 Pac., 680 (Colo. C. A.)

The jury, under the instructions given them, must necessarily have found that defendant failed to observe this salutary admonition of law.

Further answering appellant's contention, it can be said that in this state questions of contributory negligence are for the jury. The instructions given them on that point are free from criticism. The verdict of the jury disposed of this issue against appellant. *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo., 219.

Appellant's counsel have ably discussed the question of assumption of risk. The rule laid down by our supreme court is:

"An employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious or that would have been known to him had he exercised ordinary diligence," etc. *Monarch M. & D. Co. v. De Voe*, 36 Colo., 270.

"There is no rule which imposes upon a servant the duty of making an inspection or examination for the purpose of discovering defects which are not open and obvious. The exercise of the ordinary diligence imposed upon an employee does not extend to this length," etc. *Burnside v. Peterson*, 43 Colo., 382.

The rule is supported by Labatt, Master and Servant, page 1137; *Müller v. Inman, Poulsen & Co.* (Oregon), 66 Pac., 713; *Huddleston v. Lowell Machine Shop*, 106 Mass., 282.

The evidence is conclusive that the starting box, against which plaintiff's head was pinned, was underneath the top of the machine, practically out of

vision to one standing on his feet. Neither the box nor dangers lurking therein were obvious to plaintiff. Notwithstanding the fact that the current could have easily been turned off by the employees, at the pedestal, after work, a custom had been permitted to become established of leaving the current turned on. This was directly charged by plaintiff as negligence on the part of defendant and the proximate cause of the injury. The instructions to the jury on this question were guarded, and amply supported by the facts and sound law.

After careful scrutiny of the record we fail to discover any prejudicial error in the rulings of the court concerning the admission or rejection of evidence at the trial.

The judgment will be affirmed.

Judgment Affirmed.

[No. 3460.]

IN RE SKELTON'S ESTATE.

Appeal dismissed on the authority of a previous decision of the supreme court.

Appeal from Arapahoe District Court. HON. FLORENCE ASHBAUGH, Judge.

MESSRS. STUART & MURRAY, for appellant.

Appeal dismissed.

Per curiam.

Appeal dismissed on authority of *Brady v. People*, 45 Colo., 364.

[No. 3492.]

PRICE V. KIT CARSON COUNTY.

1. PLEADINGS—*Complaint—One Good Cause of Action.* A demurrer interposed to the complaint as a whole is properly overruled if any count states a cause of action.

2. PUBLIC OFFICER—*Liability to County for Fees Collected.* Prior to the Salaries Act (Laws 1891, 307) a public officer was entitled to all the fees and emoluments of his office. Under sec. 22 of that act (Rev. Stat., sec. 2554) as modified by sec. 15, art. 14 of the constitution, the fees collected by the officer up to the amount of his salary belong to him. He is required to pay into the county treasury only the surplus.

3. — *Liability for Failure to Collect or Tax Fees.* No statute renders a county judge liable to the county for fees which he has not collected; nor is he liable for the mere failure to tax fees for services rendered. He is only liable under the statute for a failure to collect. The provisions of sec. 23 of the Salaries Act (Laws 1891, 314, Rev. Stat., sec. 2550) are to be strictly construed. The penalty is not to be imposed in cases not within the statute, nor beyond the limit prescribed.

4. APPEALS—*Presumptions.* Where there is no bill of exceptions it will be presumed that the evidence sustained the findings and judgment, provided that under any condition of proofs the judgment is within the allegations of the complaint.

5. — *Abstract.* Where the printed abstract of the record fails to show the date of the institution of the suit a plea of the statute of limitations will not be considered.

6. — *Judgment.* The judgment being excessive in amount was reversed, the costs of the appeal taxed to the appellee with directions to the court below to enter judgment for the proper sum.

Appeal from Kit Carson District Court. HON. W. S. MORRIS, Judge.

Mr. P. B. GODSMAN, MESSRS. ALLEN & WEBSTER, for appellant.

MESSRS. ORR & CUNNINGHAM, Mr. H. M. MASON, for appellee.

Judgment reversed.

WALLING, Judge.

Appellant, a former county judge of Kit Carson county, was defendant in the action in the district court, and has appealed from the judgment therein rendered against him in favor of the board of commissioners of that county. The abstract of record contains the following pleadings in the action, to-wit, a second amended complaint, the answer thereto, and the replication to that answer. The second amended complaint set forth two causes of action, in the first of which it was charged that the defendant, while county judge, collected and received fees for services rendered by him as such officer, in excess of his salary and legal expenditures, to the amount of \$52.40, which he had failed to pay over to the county treasurer. No question affecting the judgment upon this cause of action has been argued, and no further special comment will be made with respect to it.

The facts stated in the second cause of action, as to the alleged liability of the defendant therein asserted, are substantially the following. During the year from January, 1904, to January, 1905, the defendant was the county judge of said county, and as such was entitled to a salary of one thousand dollars, the full amount of which, with all expenses to which he was entitled, was retained by him out of the fees and earnings of the office collected by him. During the same year, he performed services, incident to the duties of his office, for which certain fees were by law required to be charged and collected, and thereby earned surplus fees, above his salary and expenses, amounting to the sum of \$3,645.95. These last fees were earned by reason of the performance by the defendant of various ser-

vices, shown by the records and files of cases, and other proceedings in his court, and also appearing from a record kept by him of miscellaneous services performed, such as taking acknowledgments, making certified copies, etc. A "schedule," purporting to show the fees legally chargeable for those services, aggregating the sum last mentioned, was set out in the complaint; and it was alleged that the defendant had neglected and omitted to tax those fees, or to account for the same in any manner, as earnings of his office; and that he negligently and wilfully failed to collect such fees. The defendant answered at considerable length, setting up several defenses to the causes of action alleged in the complaint. The affirmative defenses were sufficiently put in issue by the replication; and, in view of the condition of the record, it is unnecessary to consider any of those defenses. The first defense pleaded amounted to a general demurrer to the complaint. It appears from the abstract that a hearing was had upon the demurrer contained in the answer, and the same was overruled, prior to the filing of the replication. One of the defenses, after admitting the defendant's incumbency of the office, during the time mentioned in the complaint, the collection of fees earned therein, and payment therefrom of the defendant's salary, averred that the defendant had duly and fully reported and made accounting for the fees and earnings of his office, and had paid over all surplus earnings to the county treasurer; and denied all allegations of the complaint not specifically admitted. It further appears that the cause was tried to the court, who found that the defendant was "indebted

to the plaintiff, by reason of the matters and things set forth and alleged in the complaint, in the sum of \$1,507.95, for fees, commissions and emoluments earned while judge and acting clerk of the county court of Kit Carson county, Colorado, during the year 1904, and which said defendant negligently failed to collect, and failed and refused to pay over to said Kit Carson county; and that said sum is over and above the earnings, heretofore reported by defendant to plaintiff, and above all salary and expenses to which the said defendant became and was entitled for said period of time;" and judgment was rendered against the appellant for the sum last mentioned. There is no bill of exceptions; hence the evidence and proceedings at the trial are not before us.

The demurrer was to the complaint as a whole. Therefore, it was properly overruled, if either cause of action of the complaint was good. *Campbell v. Shiland*, 14 Colo., 491. It has not been claimed, in argument, that the first cause of action was insufficient, and for that reason alone, the assignment of error based upon the overruling of the general demurrer cannot be sustained. We are bound to assume that the evidence supported the court's findings and judgment, provided that the judgment was authorized by the allegations of the complaint, under any conditions of proof. So that our investigation, upon this record, is limited by the rule, which was declared in *Barr v. Foster*, 25 Colo., 28, as follows:

"As we have frequently held, an exception is necessary to enable this court to review the judgment or decree of the trial court upon the evidence; but in none of the cases is it held that an exception

to the judgment is necessary to enable the court to examine and correct an error apparent upon the record; but, on the other hand, the rule is, when the error in the judgment does appear in the record proper, the court will consider and correct it, although no exception has been taken. *Thornton v. Brady*, 100 N. C., 38; *In re Johnston*, 54 Kan., 726; *Gower & Holt v. Carter & Shattuck*, 3 Iowa (Cole's ed.), 244; *Jones's Heirs v. Jones's Adm'r.*, 42 Ala., 218. Since the abstract nowhere mentions the fact that a demurrer was interposed, or presents the ruling thereon, we are not at liberty under our rules, to consider this assignment; and the only question presented for our determination is as to the sufficiency of the allegations of the complaint to sustain the decree rendered; in other words, whether the complaint states any cause of action, and if so, whether such cause of action entitles plaintiff to the relief granted."

The rule that the allegations of the complaint will be examined, on appeal, to determine whether they sustain the judgment, was applied in the case of *Frost v. Board of County Commissioners of Teller County*, 43 Colo., 43; and that decision, in its implications, at least, furnishes a direct and controlling precedent for the holding that the second cause of action of the complaint now being considered shows a right of recovery, to some extent, against the appellant. In the Teller county case, the defendant was sued, in a single cause of action, for the amount of surplus fees, alleged to have been earned by him, as county judge, in excess of his salary. It did not appear from the averments of the complaint, as stated in the opinion of the

court, whether the fees sued for had been collected by the officer, or not; but the evidence showed that a part of the total amount claimed had not been collected. It was held that the complaint was insufficient to sustain the judgment, which had been rendered against the defendant. Mr. Justice Helm, delivering the opinion of the court, referred to section 1936d1, 3 Mills' Ann. Stat. (Rev. Sup.), which reads: "Every officer named herein shall collect every fee, as prescribed in this act, for services performed by him, in advance, if the same can be ascertained, and when any officer shall negligently or wilfully fail to collect any such fee, the same shall be charged against him on account of his salary." (This was section 23 of the "act to provide for the payment of salaries of certain officers," etc., approved April 6th, 1891.)

The learned justice, commenting on that section, said:

"By this statute the duty of collecting fees in advance is imposed upon the officer where the same can be ascertained; but the fact is recognized that sometimes such prior ascertainment may be impossible, and therefore the fees may not be so collected. In order to stimulate or coerce the collection of the fees earned and belonging to the county, to-wit, the excess above the sums necessary to make up the officer's salary, the penalty of charging the uncollected portion thereof against his salary is provided; but this penalty is not to be enforced unless the failure to make such collection is due to the negligence or wilfulness of the delinquent official. It follows, therefore, that the essence of the present action, in so far as it involves the uncollected fees,

is negligence or wilfulness on the part of the appellant in the premises. And we are of the opinion that the complaint is further defective because it entirely fails to charge any such negligence or wilfulness."

From reading the entire decision, the conclusion is plain that the court was of the opinion that the penalty could be enforced, under sufficient allegations, in an action brought by the board of county commissioners against the delinquent county officer. In this view, the averments of the second cause of action here under consideration stated a cause of action to recover the statutory penalty, for the alleged wilful or negligent failure of the defendant to collect the fees therein referred to, within the ruling of the Teller county case, and stated no other cause of action. And the conclusion follows that the judgment against appellant was correct, upon the record, to the amount of the penalty prescribed by the statute. While it appears that counsel for the county board do not, in argument, expressly rely upon the decision in *Frost v. Teller County*, they have not suggested any other principle by which their second cause of action may be supported. The two causes of action stated in the complaint are thus summarized by counsel for the appellee county; "First, to recover from the defendant the sum of \$52.40, for services rendered as county judge and acting clerk of Kit Carson county, during the year 1904, to and including January 9th, 1905, when his term expired, which said earnings were taxed upon his record and were collected by him, but were never accounted for in any manner, although representing an excess or surplus

over and above his salary of one thousand dollars per year which had been paid to him for said period of time. Second, to recover upon another cause of action (as shown by the schedules itemizing alleged earnings) the sum of \$3,645.95, for services performed by him in the aforesaid capacity, and as taxed in accordance with the fee and salary act of our statute in respect to fifth class counties; and the defendant is charged in this, the second cause of action, with having performed such services, but that he *never taxed the same upon his records* in any manner as fees earned, and never accounted for them in any manner; that he never collected the same, and that his failure to do so was neglect." In other words, the first cause of action represented the aggregate of surplus fees, which the defendant had actually collected and not paid over; while the second cause of action was for the alleged amount of taxable fees, as scheduled by counsel for the county from certain records and files found in defendant's office, which he had not taxed, collected or accounted for. Appellant was not required, by any law within our knowledge, to account for—in the sense of paying—fees which he had not collected; nor was he liable to the county for mere failure to *tax* fees for services rendered. As to uncollected fees, he was only liable, under the statute, for the negligent or wilful failure to collect; and the alleged neglect to make a record of such fees, in this case, only affected the matter of proof.

The case of *Frost v. Teller County* differed from the one at bar, in the somewhat important particular, that in the former case the uncollected

fees were less than the salary of the officer, while in the present case the judgment was for more than the amount of the salary, plus the amount claimed under the first cause of action. If, then, the judgment was in excess of the penalty provided by the statute, it cannot be upheld as to such excess, whatever the proof may have been. In the Frost case mentioned, the question before the court for decision was whether or not an action could be maintained by a county, against one of its officers, for his failure to collect the statutory fees for official services rendered by him, the officer having collected fees enough to pay his own salary. And it was evidently held that such an action does not lie, unless based upon allegation and proof that the officer has wilfully or negligently failed to perform the duty enjoined by the statute, so as to make him liable to the penalty in that case provided. The holding that recovery in such a case is for a penalty, is sustained by many other decisions in this state. See *Gregory v. Bank*, 3 Colo., 332; *Hazleton v. Porter*, 17 Colo. App., 1; *Dart v. Hughes*, 49 Colo., 465. It is a recognized principle of construction, that a statute imposing a liability in the nature of a penalty will be strictly construed; and the penalty is not to be extended to cases not within the terms of the statute, or increased beyond the limit prescribed. *Commissioners v. Law*, 3 Colo. App., 328; *Colo. F. & I. Co. v. Lenhart*, 6 Colo. App., 511; *Hazleton v. Porter*, *supra*. The section imposing the duty to collect the fees, and providing that "when any officer shall negligently or wilfully fail to collect any such fee, the same shall be charged to him on account of his salary," is found in the

"salaries" act of 1891, which was the first law in the history of the state providing salaries for the county officers therein mentioned. Prior to that act, such officer was entitled to all the fees and emoluments of his office, and the county had no possible interest in the collection thereof. *Adams v. People*, 25 Colo., 532, 539. The preceding section (22) by its terms, required county officers to pay over *all fees* collected by them to the county treasurer, to be kept by the latter in certain funds, out of which the salaries or compensation of the respective officers should be paid, the balance to be turned into the general county fund. In *Airy v. The People*, 21 Colo., 144, it was held that the fees collected belong to the officer up to the amount of his annual salary, and that he cannot be required to pay into the county treasury any part of such fees, except the surplus over his salary. This ruling was based upon the provisions of section 15, of article XIV, of the constitution, and necessarily modified section 22 of the "salaries act" of 1891. The court had in mind this implied modification of the statute, when it was said, in *Frost v. Teller County*, that "in order to stimulate or coerce the collection of the fees earned and belonging to the county, to-wit, *the excess above the sums necessary to make up the officer's salary*, the penalty of charging the uncollected portion thereof against his salary is provided." While, in a literal sense, the uncollected fees cannot be charged against the officer's salary—since the county is only entitled to fees collected above the amount necessary to make up the salary—nevertheless, the amount of the salary received by the officer must be taken as the

maximum limit of the penalty for the negligent or wilful failure to collect; and this is understood to be the effect of the decision in the Frost case. If this view is correct, the judgment against appellant was excessive, upon the allegations of the complaint, to the extent of the difference between the amount of the judgment rendered and \$1,052.40, the latter sum being the defendant's salary for the year mentioned, plus the amount claimed in the first cause of action.

It was alleged in the answer, as a defense to both causes of action of the complaint, "that the same are barred by the statute of limitations of this state." It has not been claimed that the first cause of action was barred by any statute of limitations; but it was stated in appellant's brief that the second cause of action was within the section of the statute, limiting the time within which to commence an action to recover a penalty. Inasmuch as the abstract of the record fails to show when the action was commenced, and counsel have not briefed any authorities bearing upon the right of appellant to rely on the statute of limitations, we are not required to undertake an investigation of the subject.

The judgment of the district court is reversed, and the cause is remanded to that court, with instructions to enter a judgment in favor of the plaintiff against the defendant for the sum of \$1,052.40, with the costs of the action therein. The costs of this appeal will be paid by the appellee.

Reversed.

CUNNINGHAM, J., having been of counsel, took no part in the hearing or decision of the case.

[No. 3493.]

GLAISTER V. KIT CARSON CO.

1. PUBLIC OFFICER—*Liability for Fees Collected for Services Rendered Under the Acts of Congress.* Under sec. 15, art XIV of the constitution, immediately upon the taking effect of the Salaries Act (Laws 1891, 307) the salary prescribed by law for the officers therein named became the sole compensation of the officer. Everything above the amount of his salary received by the officer for services performed in his official capacity it was his duty to turn into the county treasury.

A judge of the county court is liable to account to the county for fees received by him under the authority of the acts of Congress, for oaths administered, affidavits taken, and proofs made before him, in his official capacity, relating to the entry of public lands, even though such services could not have been compelled, nor the officer required to exact or collect the fee. That the fee prescribed by the act of congress is less than that prescribed by the statute of the state is not material.

2. CONSTITUTIONAL LAW. Sec. 15 of art. XIV of the Constitution was not self-executing. Legislation was required to give it effect.

Appeal from Kit Carson District Court. HON. W. S. MORRIS, Judge.

MR. P. B. GODSMAN, MESSRS. ALLEN & WEBSTER, for appellant.

MESSRS. ORR & CUNNINGHAM, MR. C. M. HAWKINS, MR. H. M. MASON, for appellee.

WALLING, Judge.

This was an action brought by the board of county commissioners of Kit Carson county against the appellant to recover from the latter the amount of certain fees alleged to have been earned by him, in his official capacity as county judge of the county, in excess of the salary allowed him by law, by reason of services performed by him in his official ca-

capacity, as judge and acting clerk of the county court. A general demurrer to the complaint was overruled by the district court. Thereafter the defendant answered, repeating his general demurrer as a first defense to the complaint. For a second defense, the answer admitted that, during the time mentioned in the complaint, defendant was the judge of the county court of Kit Carson county, and acted as clerk thereof, and denied every other allegation of the complaint. There is no bill of exceptions in the record, and the only error urged for the reversal of the judgment is the overruling of the demurrer to the complaint. In support of the demurrer, a single question has been raised in argument, which is based on the allegation of the complaint, to the effect that the fees sued for were "for services rendered by defendant, acting in his official capacity as judge of said court and as acting clerk thereof, during said period of time, in and about the preparation and execution of land office entries, by settlers, for unappropriated lands of the United States under various acts of congress pertaining thereto, and including also, among other things, services rendered by defendant in his official capacity, in and about the taking of final proofs for homestead and desert land entries, preparation of contests by, and hearings thereon had before said defendant, and various other and sundry services which were performed by said defendant, in his said capacity, pertaining to matters incident and in relation to appropriated and unappropriated United States government lands, the exact nature and extent of which said services so rendered by defendant is to plaintiff unknown." It is proper to say,

in this connection, that the complaint also alleged "that plaintiff has made diligent effort to ascertain the nature and extent of such services so as aforesaid performed by defendant, but that defendant—although claiming to have kept, and to now have in his possession, a record of such services so rendered—yet said defendant has refused and still refuses to deliver up the same to plaintiff, or to anyone for its use and benefit, as provided by law; and said defendant refuses to disclose to plaintiff the nature or extent of his earnings in this behalf." It is asserted, on behalf of appellant, that the action was brought to recover for fees accrued in connection with acts done by the defendant by authority of section 2294 of the Revised Statutes of the United States, as amended by the act of congress, approved May 26th, 1890 (26 U. S. Stat., p. 121), relating to the making of certain proofs, oaths and affidavits, under the public land laws of the United States, before a judge or clerk of a court of record for the county wherein the land is situated. The federal law under which the alleged services were performed, it is said, prescribes the amount of the fee, which may be charged for every such service, and makes the exaction by the officer of a greater sum a misdemeanor, punishable by fine; and the claim is made that those services were not such as appertain to the office of judge or clerk of the county court, under the laws of the state, and were not within the purview of state laws requiring the fees collected by the officer, above the amount of his statutory salary, to be paid into the county treasury. The answer to that contention seems plain. So far as the federal statute mentioned can be said

to affect the matter in controversy at all, the authority to do the things and receive the fees therefor, as in the act provided, was conferred upon the judge or clerk *virtute officii*, and not in his individual capacity. The authority follows the office, and is by no means a personal right or privilege of the occupant for the time, who is empowered to perform the services and receive the prescribed fees only by reason of his incumbency of the office. So that, if we assume that the construction put upon the complaint by counsel for the appellant is correct, there is no reason to say that it was therein improperly alleged that the fees in question were for services rendered by the defendant, "acting in his official capacity as judge of said court and acting clerk thereof." See *Rhea v. Board*, 13 Idaho, 59; *Finley v. Territory*, 12 Okla., 621. The purpose of the federal statute was to permit persons, desiring to initiate or complete proceedings for the acquisition of title to public lands, for the sake of convenience, to go before the judges or clerks of the local courts, for the purpose of making the oaths and proofs, mentioned in the statute, with the same effect as if those things were done before the officers of the general government. Congress, in recognizing the validity of certain acts of these local state officials, exercised the indisputable right to regulate the compensation for the services rendered to individuals, availing themselves of the provisions of the statute, by limiting the fees to be paid for such services, and, in order to make such limitation effective, to impose a penalty for any excessive charge. That penal provision, however, does not at all affect the proposition that the pre-

scribed fees are to be collected by the officer, for acts done by him in and by virtue of his office. The federal statute confers no new official character upon the officers therein mentioned, nor does it, with respect to the acts authorized, have the effect to segregate the officer from his office. The cases above cited carry the discussion much farther than is necessary for the present purpose, since the single question for decision here is whether or not the complaint stated a cause of action for the recovery of any earnings arising out of services rendered in connection with settlements upon and acquiring title to public lands of the United States. It may be that the performance of such services could not have been compelled, and that appellant could not have been required to collect the fees prescribed for the services rendered. But it does not follow that he may not be required to pay the fees collected by him into the county treasury, as surplus earnings of his office, after he has received his salary in full. The suggestion that the fees allowed by the federal statute are less than those fixed by the state law to be charged for similar services by officers of counties of the fifth class, is quite immaterial. Manifestly, the county could not claim the benefit of the officer's services, and deny him the right to receive the stipulated compensation.

Section fifteen of article XIV of the constitution was not self-executing, and legislation was required to give it effect. It declares, among other things: "where salaries are provided, the same shall be payable only out of the fees actually collected, in all cases where fees are prescribed. All fees, perquisites and emoluments above the amount

of such salaries shall be paid into the county treasury." Until salaries were provided by law for county officers, all of the fees collected by any such officer belonged to him absolutely. *Airy v. The People*, 21 Colo., 144; *Adams v. The People*, 25 Colo., 532, 539. Upon the taking effect of the statute prescribing the salaries of county officers, including judges and clerks of the county courts, the last sentence of said section fifteen, above quoted, was *eo instanti* operative and of full effect and vigor. The expression "all fees, perquisites and emoluments" seems to require neither explanation nor definition. Words could scarcely have been better chosen to express the idea that the salary provided by law should be the sole compensation of the officer, and that all that was collected or received, above the amount of the salary, for services performed in his official capacity, should be turned into the county treasury. To argue that the provision means something different from or less than the obvious import of the words used would be palpable sophistry. The complaint alleged that the defendant had received his salary in full out of the earnings of his office, for the period mentioned, and that the fees and earnings sued for were "over and above his salary and all expenditures to which he was entitled." We think that the complaint stated a cause of action for the recovery of surplus fees collected by the defendant, and that there was no error in overruling the demurrer. The judgment should be affirmed.

Affirmed.

CUNNINGHAM, Judge, having been of counsel, took no part in the hearing or decision of the case.

[No. 3500.]

WARD V. COLORADO EASTERN RAILROAD CO.

1. **CONSTITUTIONAL LAW—Article XX—Effect.** Immediately on the taking effect of article XX of the constitution, the power to grant franchises to occupy the streets, alleys or public places of the City of Denver was transferred from the city council to the qualified tax paying electors of the new municipality.

An ordinance of the city council adopted subsequent to the constitutional amendment, and prior to the adoption of the charter thereunder, granting to a railway company the right to occupy certain streets and alleys, was without effect, either as a grant or as a mere permit or license; it conferred no right whatever.

2. **RAILWAY COMPANY—Power to Change Route.** The power of a railway company to change its route is not an absolute one; nor can it be exercised at will, and without regard to the rights of third persons who would be injured by the change.

3. **PUBLIC STREETS—Obstruction—Injunction—Who May Complain.** The threatened obstruction of a public street, without lawful authority, and causing serious special injury and diminution in value to a property occupied for the purposes of business, entitles the owner of such property to an injunction, even although the property so damaged is at some distance from the place of the obstruction. Such an obstruction interfering with passage and diverting traffic is a nuisance and the injury is irreparable at law.

Appeal from Denver District Court. HON. CARLTON N. BLISS, Judge.

Mr. JOHN A. RUSH, for appellant.

MESSRS. ROGERS, ELLIS & JOHNSON, for appellee.

CUNNINGHAM, Judge.

In order to make as clear as possible the discussion of the points presented for consideration by this appeal, we shall first state chronologically the historical facts out of which they spring. The italics used throughout are ours.

In January, 1886, the council of the city of Denver passed an ordinance granting to The Denver Railroad and Land Company the right to lay and operate a single track of three feet gauge on a short section or portion of Wewatta-street, the distance on said street covered by the grant being but a few blocks. Said track was to be used for general steam railway purposes. Sections 6 and 7 of said ordinance read as follows:

"Sec. 6. That the *existence and duration* of the privileges hereby granted is upon the condition that the tracks of said company shall be completed and that trains shall be in actual and regular use each day for the carriage of freight and passengers *within six months from the date of the publication of this ordinance*; that the duration of the said privileges shall only continue so long as trains are in regular use as aforesaid, otherwise this ordinance is to be null and void, and the said privileges forfeited, unless legally obstructed by adverse proceedings.

Sec. 7. That the privileges hereby granted to said company *shall not be subject to transfer or assignment either voluntarily or by operation of law*, except by the consent of the city council of the city of Denver first had and obtained."

In March of the year following, 1887, an ordinance was passed by the said city council, recognizing a change of the corporate name from "The Denver Railroad and Land Company" to "The Denver Railroad, Land and Coal Company." By said ordinance of 1887 the company was also given the right to make the road standard gauge by laying a third rail and to extend the same on Wewatta street

some five or six blocks farther than by the first ordinance it was permitted to do.

Sec. 3 of the ordinance of 1887 reads as follows:

"Sec. 3. That the terms and requirements of said ordinance No. 8 of the series of 1886, so far as applicable, shall apply to and constitute the term and requirements in the laying of said additional rail and in the extension of the track of said company within the city and the provisions in said ordinance as to laying the tracks in the center of the street, placing the same at grade, and the changing, elevating or lowering the same by requirement of the city council, and in general all the provisions of said ordinance No. 8 shall be held to apply specifically to the additional grant or franchise herein conferred upon said company."

At the November election in 1902, an amendment to the constitution of this state was adopted, which amendment is known as art. XX, the last paragraph of sec. 4 of said amendment reading as follows:

"No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax paying electors, and the question of its being granted shall be submitted to such vote upon the deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise."

This amendment, by proclamation of the governor duly issued, went into effect on or about December 1st, 1902. On October 5th, 1903, almost a

year after the adoption of the aforesaid amendment, the city council, proceeding under the old city charter, passed an ordinance purporting to grant to defendant company a right of way or franchise over certain streets and alleys of said city and county of Denver, on which it had not theretofore claimed or been granted any privileges. This ordinance was to take effect upon the company accepting the conditions of the same, among which was one annulling the Wewatta street franchise or grant. We assume, nothing in the record to the contrary appearing, that the company accepted the conditions of the ordinance, and relinquished whatever right it possessed in virtue of the former ordinance in and to the Wewatta street grant. The right of way which the last ordinance attempted to vest in the company passed along and over a portion of Cline street in the city and county of Denver, on which is a two-story brick hotel property, in which plaintiff resided, and which he owned and operated as a hotel.

The amendment of the constitution referred to, provides, among other things, for the adoption of a new charter by the consolidated municipality of the city and county of Denver, which its adoption created, but the new charter had not been adopted at the time of the passage of the third ordinance above referred to. The amendment contained a provision reading as follows:

“The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, *and as far as applicable*, be the charter and ordinances of the city and county of Denver.”

Notwithstanding the conditions in sec. 7 of the ordinance of 1886, forbidding the grantee or beneficiary therein named, to transfer the franchise by said ordinance granted it, the corporation appears to have given a trust deed, early in 1887, which included said franchise. This trust deed was later foreclosed, and it is admitted that whatever rights appellee ever had in and to the Wewatta street grant were transferred to it by one Burke, who bought the property under the foreclosure of the trust deed aforesaid.

Although almost twenty years had elapsed between the date of the Wewatta street grants, and the passage of the ordinance of 1903, no attempt appears to have been made by the company to construct a road on Wewatta street, or otherwise comply with sec. 6 of the ordinance of 1886. Whatever right appellee has in Cline street is dependent wholly upon the last of the three ordinances, that is, the one passed in 1903.

The plaintiff, Ward, filed his bill of complaint in the district court, alleging that the defendant company was preparing to grade and lay its tracks across Cline street, at a considerable elevation above the natural surface of said street, in the vicinity of his property, in such a manner as to intercept travel, seriously curtail his trade, and thereby greatly diminish the income which he enjoyed therefrom, and depreciate the market value of his real estate, consisting of six lots and the hotel building. He further charged that the defendant was thus proceeding in the construction of its road bed and in the laying of its tracks, without warrant, right or authority. He asked that the defendant

be enjoined and restrained from proceeding with said work. A temporary restraining order was granted. The defendant answered, asserting, among other things, its right to lay the track under the ordinance of 1903. A hearing was had, resulting in the dissolution of the temporary restraining order, and the dismissal of plaintiff's bill, from which order and decree the plaintiff prosecutes this appeal. No evidence was offered on the hearing by the defendant. The evidence produced by the plaintiff clearly established his contention that the completion of defendant's road across Cline street would result in substantial damage to his business, reducing most seriously the daily income which he derived from his hotel property, and depreciate the market value of his real estate (estimated to be \$50,000) fully one-half.

1. If the ordinance of 1903 was valid, then the judgment of the trial court is manifestly correct, and plaintiff's relief is not by injunction. The validity of the ordinance turns upon the proper construction of that portion of art. XX of the constitution which provides for the submission of all proposed franchises relating to streets and alleys to a vote of the qualified tax paying electors.

Succinctly stated, defendant's position as to art. XX is, that the power of the city and county of Denver to grant a franchise remained unchanged and unaffected by the amendment, until the new charter of the city and county of Denver had been adopted and gone into effect. In other words, the amendment constituted the fundamental law of the city and county of Denver only after the taking effect of the new charter. Any other interpretation

of the amendment, say counsel for the defendant, would give a retrospective effect to it, and would make of Art. XX an amendment to the old and then existing charter of the city of Denver, which, by the amendment, was made the charter of the newly created municipality, *as far as applicable*. Plaintiff insists that by the adoption of art. XX, all power and authority to grant such franchises as the one under consideration was *eo instanti* taken from the city council and vested in the tax paying electors. In short, the plaintiff affirms, and the defendant denies that the provision of the amendment pertaining to franchises was self-executing.

Art. XX of the constitution has received the attention of the courts of review of this state upon several occasions. In *McMurray v. Wright*, 19 Colo. App., 22, Thompson, P. J., speaking for the court, said:

"The old charter of the city of Denver, in so far as it is the charter of the city and county of Denver, is likewise to be considered in determining the extent of the council's authority. But that charter is not the charter of the city and county except *qualifiedly*. It is such a charter only in so far as it is applicable *to the constitution of the new corporation*."

Here we find an answer to the question: What is meant by the phrase as used in art. XX, "as far as applicable?" That is, applicable to what? The court of appeals, in the quotation just made from the *McMurray* case, says it means "applicable to the constitution of the new corporation," and it also says that the old charter is only qualifiedly the charter of the new corporation. It would seem

plain, from this announcement of the court of appeals, that art. XX, upon its adoption, became at once effective, at least in certain particulars, and required no legislation to put it into effect. In other words, defendant's contention that it was intended as a part of the fundamental law of the new charter of the city and county of Denver only, and was intended merely as a guide to the charter convention in framing the new charter, would seem unsound. In *Hallett v. Denver*, 46 Colo., 487, the supreme court had under consideration sec. 4 of art. XX. In this case it was contended by the plaintiff that during the interim between the disincorporation of the former municipality and the adoption by the new city of a new charter and ordinances, the city council was without authority to make public improvements (in that case levying sidewalk assessments). While the supreme court in the *Hallett* case, found that the city council might, by virtue of their authority under the old charter, properly levy such assessment, it reached that conclusion upon the ground, as announced on page 489, that art. XX contained nothing which makes inapplicable to the new city during this interim its possession of the power to initiate and complete public improvements. On the contrary, by a strong implication at least, as the court pointed out, art. XX directly provided for such improvements by the continuance in office of the board of public works until its successor had been elected and qualified. As the court announced in the *Hallett* case, the board of public works would be a useless body were not special powers at the time and by the amendment conferred upon it, since the board of public works was

entrusted, under the old ordinances, with the supervision of public works like that involved in the Hallett case. The supreme court, in that case, at page 489, announces squarely that the phrase in sec. 4 of art. XX, "so far as applicable," has reference to art. XX, thus agreeing with the court of appeals in the McMurray opinion. In the Hallett case the supreme court used this language:

"If there is nothing in that article (art. XX) which renders inapplicable the charter and ordinances of the former city, then they are the charter and ordinances of the new city and county of Denver for the time being only."

It would seem plain, by a parity of reasoning, that the supreme court would have held, had the question been before it, that if there was anything in art. XX which rendered inapplicable the charter and ordinances of the former city, then such charter and ordinances would not become the ordinances of the new city and county of Denver for the time being, or at all.

Counsel for defendant well say: "It was, however, foreseen by the legislature that some time must necessarily elapse, and that a long time might elapse, before a new charter would be adopted." The prescience of the legislature in this behalf was abundantly vindicated by the events which followed. The interpretation insisted upon by defendant's counsel would make the provision of the 20th amendment read, in effect, as follows:

"No franchise relating to any street, alley or public place of the said city and county shall be granted, except upon the vote of the qualified tax paying electors, *unless those desiring such fran-*

chise can induce the council to act upon the application before the new charter shall be adopted and take effect."

We are unwilling to place this interpretation upon the language of art. XX, and we cannot bring ourselves to believe that such was the legislative intent, or the understanding of the voters when the amendment was acted upon at the polls. The power left remaining in the old officials, and in the old charter, was designed for temporary purposes only, and to prevent governmental chaos in the new municipality. Hence we think such power and authority should receive a strict construction; but the amendment to the constitution, being designed to protect the interests of the people, should be liberally construed, to the end that its beneficent designs may be effectuated. If the language of art. XX should receive the construction contended for by defendant, then the old council was left in a position to dispose of franchise privileges, during the interim between the adoption of the amendment and before the taking effect of the new charter, to an extent that could practically nullify the purpose of the amendment for twenty years. This interpretation would also operate to prevent, or at least to delay, the adoption of the new charter indefinitely, or might well do so, at least, while the adoption of the interpretation contended for by the plaintiff would tend greatly to accelerate its adoption.

The prime purpose of the constitutional amendment was to bestow upon the inhabitants of the city of Denver, and certain surrounding territory, a very greatly increased measure of home rule, and the object of the provision now under consideration

was to give the tax paying electors of the aforesaid territory absolute control over the granting of franchises. It must be clear that the legislature in framing and submitting the amendment, and the people in adopting it, had these purposes in mind. Therefore, it cannot be assumed that either the legislature or the people deliberately incorporated in or omitted from the amendment provisions calculated to work powerfully against and greatly delay the adoption of the charter for which the amendment provided, and which was one of its important purposes.

Again: If the old charter provisions regulating the granting of franchises be held to be operative after the adoption of art. XX and before the adoption of the new charter, then the city council was given a tremendous power which it had never theretofore enjoyed, namely, the granting of franchises over the streets and alleys and public places of all that territory which had not, before the adoption of the amendment, constituted a part of the city of Denver, but after its adoption, had become a part of the new municipality, and thus art. XX would in truth and in fact become an amendment to the old charter, at least in effect.

In *McMurray v. Wright*, *supra*, Presiding Judge Thompson, uses the following language:

“The mayor and the persons composing the council of the city of Denver, became *by virtue of the amendment* the mayor and council of the city and county of Denver. The mayor and members of the council, as well as all other officers of the new corporation, derived their title to office *solely from the amendment; they have, therefore, such powers*

as it expressly confers, or are legitimately deducible from it and consistent with it, and no other."

We think it can hardly be seriously contended that anywhere within the four corners of the amendment (from which the city council, who attempted to pass the ordinance of 1903, "derived their title to office") is power expressly conferred upon said council to grant a franchise such as the one in question; no more do we think it can be contended that there will be found any such authority legitimately deducible from the amendment, and consistent with it.

In *People v. Adams*, 31 Colo., 476, the twentieth amendment was before the supreme court for interpretation. In this case the governor, proceeding upon the assumption that sec. 45 of the old charter of the city of Denver, in so far as it pertained to his power to remove certain city officials, was still in force and applicable to the condition then existing (the new charter not yet having been adopted) attempted to remove certain of the city officials from office and to appoint successors in their place. We have examined the original briefs filed in that case, and also the briefs filed on rehearing. Brilliant counsel pressed the governor's contention upon the court. It was pointed out that the amendment made no provision for the removal of officers, and if the court should hold that sec. 45 of the old charter, which permitted the governor to remove certain officers of the city, had been annulled by the adoption of art. XX, then the power of removal rested nowhere. A most appalling picture was painted, by the attorneys representing the governor, of the results that might follow such a con-

struction of the act. The attention of the court was drawn to the fact that, no matter how corrupt or inefficient the city officials might be, they must remain in power indefinitely, and even though they might have been stricken with insanity, or had removed permanently from the city and state. Even the police force, it was contended, could not, under such interpretation of art. XX, be diminished by the discharge of a single patrolman. Yet the court, in the face of this showing, answered thus:

“The avowed object of the general assembly in submitting, and the presumed intent of the people in ratifying this amendment must be given effect if the language therein employed will allow, even if the result be a withdrawal of restraints upon the officers which heretofore have been deemed by the general assembly expedient to prescribe, or the consequences destructive of high efficiency in the discharge of public duty.”

Mr. Chief Justice Campbell, speaking for the court, continuing, said:

“It is the duty of every member of the court to give effect to the article in accordance with the intent of its framers as far as it can be done consistent with the language in which that intent has been manifested.”

And again:

“Certainly, one object was to take from the general assembly all control of the local affairs of the inhabitants of the territory included within the new body politic, and to withdraw from the governor the power which he theretofore possessed to appoint and remove the members of its fire and police board.”

And further, Chief Justice Campbell said:

"Doubtless it is wise to lodge somewhere the power of removal from office, and usually it is safe to entrust it to the appointing power; * * * While we appreciate the force of the argument of learned counsel that power of amotion should be lodged somewhere, and that, without such check upon official action, gross abuse of authority may be perpetrated by public officers, still, courts cannot interpolate such absent authority into a statute from which it is omitted, and thus remedy defective legislation."

In concluding the opinion in the Adams case, at page 482, Chief Justice Campbell used this language:

"The language of sec. 4, by which the charter of the old city was continued in force, *does not prolong the life of this removal clause*, for it is not only inconsistent with the right of the defendants to hold until their successors are elected, but it is inapplicable to the condition confronting the governor, since the power of removal therein delegated accompanies only appointments made by the governor himself."

So, if the annulling of any portion of the old charter amounts, as counsel for defendant seem to insist, to its amendment, then the supreme court has clearly held, in the Adams case, that art. XX did amend the old charter. But it is not profitable to draw nice distinctions between *annulling* and *amending* that instrument. Certain it is that both the court of appeals and the supreme court have held that upon the taking effect of art. XX, the old charter lost much of its vitality, and the city coun-

cil, of course, lost correspondingly in the matter of its authority.

Many authorities are cited by counsel on behalf of the defendant to support the elementary principle that a constitutional amendment cannot operate retrospectively. No contention is made on behalf of plaintiff, indeed none could be made, that if the ordinance of 1903 had been adopted prior to the November election of 1902, it would not be in every respect valid, in so far as art. XX of the constitution is concerned. Therefore, clearly these authorities are not in point.

It is true, as pointed out by defendant's counsel, art. XX of the constitution makes no special provision for the calling and conducting of an election to vote on any proposed franchises. Neither did this amendment provide for the discharge or removal of unnecessary, inefficient or corrupt public officials during the interim between the adoption of the amendment and the new charter, but, as we have pointed out above, it was held by the supreme court in the Adams case that while it is wise to lodge somewhere the power of removal from office, courts cannot interpolate such absent authority in a statute from which it is omitted, and thus remedy defective legislation. We think it will be conceded that it was quite as important to the welfare of the city and county of Denver that corrupt or inefficient public officials should be removed from office as that a corporate franchise should be granted to the defendant in this case. Art. XX did provide a method for the speedy adoption of a charter whereby it, the amendment, could be supplemented so that franchises might, by a vote of the people, be granted.

We prefer the view which would operate to impede, temporarily, the granting of franchises, rather than the interpretation which would hold the constitutional amendment in abeyance while the friends and foes of a home rule charter fought out their differences in convention.

We reach the conclusion, without hesitancy or misgiving, that immediately upon the taking effect of art. XX, the power to grant franchises like the one in question was thereby transferred from the city council to the qualified tax paying electors of the new municipality. Hence it follows that the ordinance of 1903 was null and void, and "upon authority we hold that the ordinance in the case at bar was void and conferred no authority whatever upon the defendant, and can not be invoked to give it protection." *D. & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo., 683.

2. It is contended on behalf of defendant that the ordinance of 1903, even if void as a franchise, nevertheless constitutes a valid permit or license which remained good as against plaintiff, and as against the city, until the same was revoked by the authority that attempted to make the grant, namely, the city. Under the law existing prior to the adoption of art. XX, this contention may have been sound, that is, the council, having under the previous law, authority to make the grant, a defective attempt by it to grant a franchise might operate as a license or permit. But the law with reference to grants of this character was so radically and fundamentally altered by the constitutional amendment as to make prior decisions on this point inapplicable. The council, being wholly without authority to grant

a franchise in 1903, its abortive attempt so to do conferred no right whatever upon the defendant company. *D. & S. Ry. Co. v. Denver City Ry. Co.*, *supra*. Especially is this true where the attempted grant was designed to confer a right on the company to construct the main line of its road over the streets of the city. The council being without power to make grants of this character, we are not called upon, under the facts disclosed by the record in this case, to consider and determine its power and authority to grant permits for local or limited incidental privileges such as that involved in the case of *McPhee & McGinity v. U. P. Ry. Co.*, 158 Fed., 6, to which our attention has been directed.

3. Whether the defendant company had, for any reason, forfeited its right to occupy Wewatta street, or to construct its road thereupon, at the time of the passage of the ordinance in 1903, or whether any such right was ever acquired by the defendant company, are likewise questions not before us for consideration. Indeed, it is said in the brief of the defendant company that, "it is immaterial whether the appellee had any franchise on Wewatta street at the time the ordinance of 1903 was adopted." The company may have had power, under the charter and general law, to alter or change its route, as is contended in his behalf that it had, but it will not be seriously urged that such right was absolute, or that it could be exercised at will, and without regard to the vested rights of those who would be injured by such change. Nor could the company acquire such right from a legislative body which had, by a constitutional amendment, been de-

prived of all authority in the premises. *D. & S. Ry. Co. v. Denver City Ry. Co.*, *supra*.

4. It is next contended by the defendant company that the plaintiff may not maintain this action, because the defendant's tracks about to be laid, would not pass directly in front of plaintiff's property; plaintiff's property does not abut upon that portion of Cline street over which it is proposed to construct plaintiff's tracks. It is alleged in the defendant's answer, and established by the proof, that the line of road or route as surveyed and located, crosses the east line of said Cline street at a point between sixty-five and seventy feet distant from the northwest corner and nearest point of plaintiff's lots. The evidence shows that the line crosses Cline street at a point between plaintiff's property and the stockyards, and crosses at such a grade as to make travel from the stockyards to plaintiff's property impracticable, if not impossible. The greater part of plaintiff's business, as shown by the evidence, comes from those frequenting the stockyards or having business there.

In *Railroad Co. v. Foley*, 19 Colo., 280, appears the following:

"It is settled in this state that unlawful obstruction of a business street more or less remote from abutting property, if it causes a special injury thereto, entitles the owner of such property to recovery therefor."

Citing *Jackson v. Kiel*, 13 Colo., 378. See also *Brunswick Co. v. Hardey*, 112 Ga., 604; 37 S. E., 889. *Adams v. Ry. Co.*, 39 Minn., 288; 1 L. R. A., 493. *Stetson v. Faxon*, 19 Pick., 147; 31 Am. Dec., 123.

Under these authorities it would seem that plaintiff's right to maintain the action does not turn upon whether his property abuts directly upon defendant's proposed line of road or not. It is sufficient, if the location of defendant's tracks be such as to result in direct, serious and special injury to plaintiff's property.

5. The only question remaining which we think demands consideration is as to the right of the plaintiff, under the pleadings and the proof, to injunctive relief. It is stoutly contended by counsel for the railroad company that plaintiff's only remedy is an action at law for damages. Much of the defendant's argument on this point is based upon the untenable assumption that the action of the city council in passing the ordinance of 1903 vested in it either a valid franchise or a revocable permit. If this position were sound, then many of defendant's authorities, such, for instance, as *Haskell v. Denver Tram. Co.*, 23 Colo., 60; *D. & S. R. Co. v. Domke*, 11 Colo., 247, and *D. U. P. R. Co. v. Barsuloux*, 15 Colo., 290, would be in point, and would seem to sustain its contention in this behalf. But we need not go out of our own state for authorities to support the doctrine that the construction and maintenance of a railway over the streets of a city (especially a steam road), without authority, constitutes a public nuisance, and may be enjoined at the suit of any individual who suffers a special injury as a result thereof. In *D. & S. R. Co. v. Denver City R. Co.*, *supra*, after holding that an ordinance and resolutions of the city council attempting to confer authority to construct a railway track was void, it is said:

“What was the legal character of the acts of the defendants in the construction of a railway in Holladay and 23rd streets? Upon the established fact we must say they created a public nuisance. If authorized by law, its acts might have been justified, no matter how much inconvenience to the public they may have occasioned, but, being without right, no matter how little inconvenience this permanent appropriation of a part of the street may occasion, they cannot defend themselves from the charge of nuisance. The authorities for this position are consistent and uniform, and leave no doubt on the question. 14 N. Y., 524, and cases cited.

* * * In this feature of the case the complainant is entitled to relief just so far as its allegations sustained by proof will justify a court of equity in interfering in its behalf. In so far as it suffers from the wrongful acts of the defendants, in common with the public generally, it cannot have relief; but to the extent that its private rights are invaded or threatened by a wrong-doer, it is the duty of the court to protect it.”

In *High on Injunctions*, vol. 5 (4th ed.), sec. 828, it is said:

“Even where the road is being built without authority of law, it will not be enjoined at the suit of one who owns no real estate over or adjoining which it is to pass, and who will not be specially injured by its construction, but where the plaintiff owns real estate abutting upon a public street or alley, and will be subjected to injury differing in kind from that suffered by the public, such as the impairment of an easement in the highway as a means of ingress and egress to his property, result-

ing in serious and substantial injury thereto, the rule is well settled that an injunction will lie to restrain the illegal and unauthorized construction of a railroad in the highway, as, for example, *where the work is proceeding under an ordinance or license which the municipality has no power to grant.*"

In support of this statement, Mr. High cites numerous cases from Alabama, Minnesota, Tennessee and Missouri.

"Streets and highways cannot be obstructed or encroached upon by a railroad without lawful authority for such act, and where a railroad is constructed upon a street without such authority, it will constitute a public nuisance, and in such a case, one showing a sufficient injury by reason thereof will be entitled to bring an action to enjoin the same."

Joyce Law of Nuisances (1906), sec. 246. In the third edition of Pomeroy's Eq. Jur., vol. 5, sec. 478, the following is quoted from *Wahle v. Reinback*, 76 Ill., 322:

"Where the injury resulting from the nuisance is in its nature irreparable, as when loss of health, *loss of trade*, or destruction of the means of subsistence, or permanent ruin to property, will ensue from the wrongful act or erection, courts of equity will interfere by injunction in furtherance of justice and the valid rights of property."

Several other Illinois cases are cited by Mr. Pomeroy to support the above quotation.

Mr. Elliott, in his work on Roads and Streets, at sec. 394, makes this statement:

"The destruction of valuable property rights,

by raising the grade of a street, however, is more than a mere fugitive trespass, and an injunction will be awarded."

The contention made that the right of the defendant to use the street could only be challenged by a proceeding in *quo warranto* brought on behalf of the city is effectually disposed of by Circuit Judge Woods, in the case of *The General Electric Railway Co. v. Chicago I. & L. Ry. Co.*, 107 Fed., 771. The same case was also considered by the circuit court of appeals of the 7th circuit in the 98th Fed., 907, both opinions being by Judge Woods. In the course of a remarkably vigorous opinion in 107 Fed., 774, Judge Woods says:

"Ordinarily a void thing may be ignored by anyone concerned. On questions of public policy it has been ruled, and doubtless wisely, that an individual asserting only an injury for which suitable compensation may be obtained at law, may not attack a public ordinance formally adopted, and under which a public work, perhaps of great importance, is being prosecuted; but if the doctrine is to be applied when private injury is about to be inflicted, for which the relief obtainable at law could not be even approximately adequate, it becomes a bald denial of justice. The like of it has found recognition thus far, we believe, only in briefs, to which, in the face of criticism at the bar of the court, counsel have not shown an unflinching adhesion. * * * In the nature of things and on principle, there is the same right to go into equity for an injunction against a threatened irreparable injury as there is to go into a court of law to recover damages for a compensable wrong. If the laying of the street rail-

way be fully authorized, as by a valid ordinance, there can, of course, be no injunction, if there be no actual taking of property outside of the limits of the street; * * * but what good reason can there be for the application of that rule when the ordinance under which an inestimable damage is about to be inflicted is void? Why should there be an estoppel against denying the validity of the invalid—against denouncing as void an act which is in fact void, under which it is proposed to inflict an irreparable wrong? If there were no pretense of an ordinance or of other form of authority for the proposed invasion of the street, is it to be said that the owner of abutting property threatened with injury may not have relief by injunction, but must look only to the uncertain and insufficient remedies of the law? Would a forged ordinance, put upon the records of the common council without the knowledge or consent of the body by whom it purported to have been enacted, be beyond impeachment except by a public prosecutor, who, as the supreme court of the state (Illinois) has held, could move only in the public interest, at the risk of the dismissal of the proceedings if shown to be for the protection of private rights—the only rights, in most instances, likely to be imperiled? But if the work of laying a street railway, prosecuted without pretense of authority or under a forged ordinance, may be enjoined at the suit of one threatened with irreparable wrong, why should it not be enjoined in a like case if prosecuted under an ordinance which for any reason is illegal and void, not voidable merely?”

Judge Woods closes this feature of his discussion with the statement that:

"It is useless to talk of relief through the public prosecutor or attorney general of the state."

In the two opinions by Judge Woods, referred to, he had under consideration the case of *Doane v. R. R. Co.*, 165 Ill., 510; 46 N. E., 520; 36 L. R. A., 97, a case that has attracted much attention, and one of the cases cited and relied upon by the defendant in this case. It is believed that the rule laid down in the *Doane* case has been, by construction, modified by the supreme court of Illinois itself. In *Nelson v. Randolph*, 202 Ill., 531; 78 N. E. 914, a case for obstructing a highway, it was held:

"Conceding that in order to maintain a suit by an individual to enjoin the obstruction of a public highway, some special or peculiar injury must be shown, the fact that members of complainant's family are buried in the cemetery to which the highway leads, and that complainant and others have cared for the cemetery, are sufficient."

The quotation is from the syllabus, which is supported by the text.

It is said by Judge Elliott, in his work on *Roads and Streets* (2nd ed.), in a note to sec. 394:

"It seems to us that the tendency of modern thought is to extend the remedy by injunction, and this, we believe to be wise and expedient."

It must be clear that in the instant case plaintiff's injury was a continuing one, in so far, at least, as it affected his trade or business, and the damage ensuing would be impossible to definitely establish. Wrongs of this character the authorities universally hold to be cognizable at equity. The fact that no

actual damage can be proved, so that in an action at law the jury could award nominal damages only, and such an action at law would necessarily be ineffectual, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuing one.

Platte Co. v. Lee, 3 Colo. App., 185. *Medano Ditch Co. v. Adams*, 19 Colo., 328. *Sylvester v. Jerome*, 19 Colo., 128; 34 Pac., 760. *City v. Manning*, 43 Colo., 144. Angell Highways (2nd ed.), sec. 283. Pomeroy Eq. Jur. (4th ed.), vol. 5, sec. 516. *Wahle v. Reinback*, 76 Ill., 322.

In Elliott on Roads and Streets (2nd ed.), sec. 665, it is said:

"It has also been held that the injury must be irreparable, or at least incapable of full and complete compensation in damages. This is no doubt a fair statement of the general law, but the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean as used in the law of injunction, that the injury is beyond the possibility of compensation or damages, nor that it must be very great. * * * But if the nuisance is a continuing one, invading substantial rights of the complainant in such a manner that he would thereby lose such rights entirely but for the assistance of a court of equity, he will be entitled to an injunction upon a proper showing, notwithstanding the fact that he might recover some damages in an action at law."

For further authorities on the legal significance of the phrase "irreparable injury," see Words & Phrases, vol. 4, p. 3772, where the subject is thoroughly covered.

For the reasons hereinabove pointed out, the

trial court committed error in dissolving the temporary injunction, and in dismissing plaintiff's bill. The judgment, therefore, must be reversed and remanded, with instructions to the trial court to make the temporary writ of injunction permanent.

Reversed and remanded with directions.

Decided May 13, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3512.]

VANDERPAN V. PELTON.

1. **STATUTE OF LIMITATIONS—*Trust Deed.*** The statute of limitations does not bar the execution of the power of sale contained in a deed of trust, even though an action for the debt secured thereby is barred.

2. **TRUST DEED—*Who May Question the Execution of the Power of Sale.*** One claiming only a tax title to lands is not in position to question the authority of one assuming, as successor in trust, to execute the power of sale in a trust deed thereof from the original owner.

3. **TAX TITLE—*Void Deed.*** A tax deed showing the sale of several non-contiguous tracts for a gross sum is void upon its face.

So, a deed based upon a sale to the county, and an assignment of the certificate by the county clerk more than three years after the date of the sale, no authority for such assignment being shown.

Or a deed based upon a sale to the county where it does not appear that the land was offered by the treasurer on any day previous to that on which it was sold.

Or a deed executed by the treasurer of the county in which the land was situate at the date of the sale, it appearing by the face of the deed that at the date thereof it lay in a different county.

Or a deed showing that the lands were offered on two different dates, not showing on which of the two the sale occurred.

Or a deed which fails to disclose the amount of taxes due on any one of several non-contiguous tracts included in the same sale.

4. QUIETING TITLE—*Plaintiff's Possession*, need not be proven, though in issue, if no possession is shown in any other, and the plaintiff shows title in fee. The constructive possession which the law assumes in such case suffices.

5. — *Laches*. Long delay in assailing a tax title will not impair the right of the original owner to have his title quieted where it appears that the defendant acquired the tax title for a trifling sum and presumptively with notice of its questionable character.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. EZRA KEELER, for appellant.

Mr. ISAAC PELTON, *pro se*.

CUNNINGHAM, Judge.

1. Pelton brought his action in the district court of Washington county to quiet title to the southeast quarter of section twenty-eight (28), township five (5) south, range fifty-two (52) west of the sixth principal meridian, his complaint containing the ordinary allegations to support an action of that character. Defendant, Vanderpan, answered denying ownership in plaintiff, and setting up ownership in himself, based on three certain treasurer's deeds to his grantors, and quit claim deeds from said grantors to himself, but he did not plead the statute of limitations. Plaintiff replied attacking the validity of the tax deeds and each thereof. On the trial plaintiff introduced a patent from the United States, to the land in question, running to Hamilton Potter and a trust deed from Potter to Thomas O. Moffett, dated October 1st,

1888. Defendant objected to the introduction of the trust deed on the ground that the indebtedness secured by it was barred by the statute of limitations. This objection was properly overruled, and the deed admitted. *Foster v. Clark*, 21 Colo. App., 192; 121 Pac., 130, and cases therein cited. Thereupon plaintiff offered in evidence a trustee's deed, executed by the sheriff of Washington county, as the successor in trust to Moffett, who had left Colorado and ceased to be a resident of this state, said trustee's deed running to plaintiff as grantee. Defendant objected to the introduction of the trustee's deed on the ground that the debt for which the trust deed was given was barred by the statute of limitations, and further because the instrument offered as a trustee's deed was apparently executed by a person without authority, as defendant contends. The first objection was not well taken, under the authorities already cited. It appears from the record that the land in question was, at the time the patent issued and the trust deed in question was executed, situate in the county of Arapahoe, but that it had become a part of Washington county in 1903, some five years before the sale under the trust deed. The trust deed provided that in the event of the "absence from the county in which said premises are situated" of the trustee named therein, "the then sheriff of the county in which the premises are situate" should become the successor in trust with all the powers, duties and authorities of the original trustee. The remaining objections of the defendant to the introduction of the trustee's deed appears to be based upon the contention that the sheriff of Arapahoe county, and not the sheriff

of Washington county, was the proper successor in trust and the only person who could make the sale under the trust deed. This contention is based upon the use of the word "are" in the phrase above quoted, i. e., that that successor in trust should be the "then sheriff of the county where the lands *are* situate," and inasmuch as the lands were, at the time the trust deed was executed, situate in Arapahoe county, defendant insists that the sheriff of Washington county, of which the land subsequently became a part, could not act. This objection was overruled by the court. Without determining whether the sheriff of Washington county or the sheriff of Arapahoe county was the proper party to make the sale, it is sufficient to say that defendant was not in a position to question the regularity of the sale of the property under the trust deed. *Foster v. Clark, supra. Stephens v. Clay*, 17 Colo., 489. *Empire Co. v. Bender*, 49 Colo., 522, 525. We rule that the plaintiff exhibited a title or interest sufficient to maintain an action to quiet title against one claiming under a void tax deed.

2. To sustain his title, defendant introduced three tax deeds. The first of said tax deeds so offered by defendant was void upon its face for the reason that it showed the sale of several non-contiguous tracts of land *en masse* for a gross sum, and for the reason that the said land was bid in by the county and the certificate assigned by the county clerk more than three years after the date of the sale, no authority for said assignment appearing on the face of the deed, or otherwise. Said deed was void on its face for the further reason that it does not appear that the land was offered for sale by

the treasurer on any day previous to the date on which it was sold to or bid in by the county. *Bryant v. Miller*, 48 Colo., 192.

3. Defendant further offered, in support of his title, a treasurer's deed to the land in question, running to Kate Young, and based upon a tax certificate issued to one W. T. Lambert, by the treasurer of Arapahoe county in 1902, at which date the land composed a part of the then county of Arapahoe. This tax or treasurer's deed was executed in 1907 by William J. Fine, the then treasurer of the city and county of Denver. The deed shows on its face that the land in question, after the tax sale referred to, and before the issuance of the tax deeds now under consideration, became a part of Washington county; indeed, the record shows it had been a part of said last mentioned county almost four years prior to the execution of the treasurer's deed by the said Fine. Under the ruling in *Pollen v. Magna Charta M. & M. Co.*, 40 Colo. 89, the treasurer of Washington county was the proper officer, indeed, the only officer authorized to execute the treasurer's deed based on the tax sale aforesaid, hence this tax deed was void on its face. It was also void on its face for the following additional reasons: (a) it is recited that the sale of the land in question (together with several other non-contiguous tracts of land set forth in the deed) occurred on the 10th and 24th of November, A. D. 1902, but without specifically stating on which of the aforesaid dates the sale occurred; (b) the deed does not disclose the amount due for delinquent taxes on the particular property involved in this suit, or on any of the several non-contiguous tracts of land in-

cluded in the same sale. (See opinion in the case of *Henry v. Danner*, No. 3461, handed down by this court at the present term.) (c) it appears from the face of the deed that the land involved in this suit was sold with various other non-contiguous tracts *en masse* for a gross sum, hence the tax deed was properly excluded.

4. The defendant next offered in evidence, to support his claim of title, a tax deed issued to Kate Young, his grantor, by the treasurer of Washington county, based upon a tax certificate issued to William Young, in December, 1903. The record discloses that the land involved in this suit was sold for taxes and bid in by the said William Young on the date aforesaid, together with ten other non-contiguous tracts of land. There is nothing appearing on the face of the deed which enables one to determine what the amount of the delinquent tax was on the particular land here involved at the date of the sale, hence, for the reasons already stated, this deed was void on its face, and properly excluded when offered by defendant. All of the tax deeds offered by defendant being void, the quit claim deeds to defendant from the grantees named in the various tax deeds were, of course, also properly excluded.

5. There was no proof offered on the trial, by either the plaintiff or the defendant, as to whether the land was vacant and unoccupied, or as to whether either party was in actual possession thereof, and the defendant, in his brief, contends that in a statutory action to quiet title, the plaintiff must allege and prove possession when same is denied. As an abstract proposition, this contention is sound, and well supported by the Colorado authorities, but it

is not necessary, in an action to quiet title, for the plaintiff to prove actual possession, for, if it be shown that the land is vacant and unoccupied, title in fee in the plaintiff carries with it presumptive possession, or, as it has been otherwise stated, possession of vacant and unoccupied lands follows in the wake of title, and is called constructive possession. Such possession is sufficient to maintain the action to quiet title. While it is true, as has been pointed out, that neither party offered proof as to whether the land in question was vacant and unoccupied, we find that defendant, in his answer, made the following allegation: "that said premises had been at all times heretofore, and were at the time of the commencement of this action vacant and unoccupied lands." This allegation is not denied by the reply, hence stands admitted, and proof thereof would seem, under the circumstances, unnecessary.

6. Although he had not plead the statute of limitations, defendant, in his answer, attempted to plead, and on the trial sought to prove laches, and it is insisted in the brief filed in his behalf, that the plaintiff and his grantors having failed for a long number of years to challenge the tax deeds, ought not in equity to be heard now to question them. It appears from the answer of the defendant that he paid \$350 for the land, and from the decree it appears that if the judgment of the trial court shall be affirmed, he will receive, by way of taxes advanced and penalties, \$129.00. The record discloses that the defendant first became interested in the land in 1907, only a short time before the plaintiff interested himself in it. From the small sum which the defendant paid for the land, it seems at least

probable that he had knowledge of the questionable character of the title he was taking over, hence the equities between the parties is not a feature over which a chancellor need become unduly wrought up.

There are other matters discussed in the briefs, which, in view of what has already been said, we need not consider.

The judgment of the trial court will be affirmed.

Affirmed.

KING, Judge, concurs in the result.

WALLING, Judge, dissenting.

I do not agree with so much of the third paragraph of the foregoing opinion as seems to be based upon the authority of *Henry v. Danner*, or with anything contained in the fourth paragraph. With these views, I do not see how I can concur in the result.

[No. 3649.]

MONTE VISTA CANAL CO. ET AL. V. CENTENNIAL IRRIGATING DITCH CO.

1. WATER RIGHT—*Nature of the Right.* A water right is gained by appropriation, and is usufructuary in character. The appropriator has no property in the channel of the stream, nor in the water of the stream as it flows naturally therein. The water right is distinct from the ditch or other structure by which the water is conveyed. A water right is a freehold in land.

2. — *Change of Point of Diversion.* The right of the appropriator to change the point of diversion existed before the statute, and in this state has always been recognized. It is a property right, qualified by the condition that the change shall not injuriously affect the vested rights of others. The public officers charged with the distribution of water are not permitted to recognize this right, or change the point of diversion in any case until permission is granted by the proper court.

3. APPEALS—*When Is a Freehold Involved?* A freehold is never involved within the meaning of the statute conferring jurisdiction to review a judgment on appeal, unless such judgment necessarily deprives one of a freehold, or confers it upon another. The actual effect of the judgment in the particular case is the test.

Where an irrigating company petitioned for the right to change the point of diversion of the water to which it was entitled, admitting the freehold of certain other irrigating companies, protestants, and the decree granted accordingly, in no manner assumed to impair or diminish in quantity the property of any of those objecting, but declared that no right of the respondents would be injuriously affected, held that the freehold was not involved.

And a freehold was held not involved in an appeal by certain shareholders in the petitioning company where the only question was whether the conditions imposed by the decree were sufficient for their protection.

Appeal from Costilla District Court. HON. CHARLES C. HOLBROOK, Judge.

MESSRS. CORLETT & CORLETT, MESSRS. GOUDY & TWITCHELL, for appellants.

MR. JESSE STEPHENSON, for appellee.

KING, J., delivered the opinion of the court.

Motion has been made by appellants to remand this cause to the supreme court under the provisions of section 6 of the act creating the court of appeals, assigning as a reason, that the decision necessarily relates to and involves a freehold.

The judgment appealed from was rendered by the district court in and for Costilla county, in a special proceeding under the act of 1903 (S. L. '03, p. 278), on petition of The Centennial Irrigating Ditch Company, a corporation, owner of the Centennial Ditch, for permission to change the point

of diverting the water decreed to that ditch from the present headgate to a point about one and one-half miles further up the Rio Grande river. The petition alleged ownership of adjudicated water-rights, and that the change in point of diversion prayed for would not injuriously affect the rights of any person. The appellants (four canal companies, an irrigation district, and Malinda J. Workman for herself, as an heir, and as guardian of certain minor heirs) protested against the change, alleging that it would injuriously affect them, and each of them. The canal companies and the irrigation district were the owners of ditches or canals having decreed rights to the use of water from the stream junior to that of petitioner. The Workman heirs were the owners of certain shares of the capital stock of The Centennial Irrigating Ditch Company, and had been for many years receiving water through the Centennial ditch, and objected to the change, chiefly for the reason that the building of a new ditch and headgate, and securing the rights of way made necessary by the change, would occasion large expense, and that the cost of maintaining the same thereafter would be greater upon their shares of stock, and that if their water alone were left in the old ditch the cost to them of maintaining such ditch would be greater than if joined with the other stockholders.

Upon trial, and after full hearing, the court made its findings of fact that the change prayed for would not injuriously affect any person excepting the Workman heirs, and entered a decree granting the petition, except as to the water belonging to said heirs, which was ordered to be turned out as be-

fore, and the change as to them was granted upon the condition that no part of the expense of making the change and constructing the new ditch and head-gate should be assessed against the shares of stock in the Centennial Irrigating Ditch Company belonging to said heirs. From this judgment the several respondents prayed their appeal to the supreme court as provided in the irrigation statutes (sec. 2427, et seq., Mills' Ann. Stats.)

The contention of appellants is that the change granted will manifestly and necessarily result in the use of water by the petitioner for a greater length of time, or in its taking a greater quantity of water from the stream because of the larger acreage and different character of the soil intended to be irrigated, than before the change, and will also result in a much less return of water to the stream from seepage, which would require a larger quantity of natural flow than before to run down the stream to supply senior appropriations, thereby depriving appellants of a material portion of the water which they otherwise might draw from the stream; that the question is as to whether appellants, by the judgment appealed from, have been deprived of a water-right, or their right to the use of water materially lessened or diminished, and that therefore, a freehold is involved.

The testimony tended to show that under the old ditch, after a few days' irrigation, there resulted a heavy return to the stream, which supplied to a large degree the water required by senior appropriations; that under the new line of ditch a considerable acreage of land not theretofore irrigated was intended to be put into cultivation, and a

portion of the water would be carried over a divide so that the waste and seepage would not all readily or necessarily return to the stream.

The sole question for present determination is: Does the decision appealed from necessarily relate to or involve a freehold? Or, in general, is a freehold involved in a statutory proceeding for permission to change the point of diversion of a water-right, under pleadings and evidence as found in this case? The words "relate" and "involve" are synonymous as applied to the provisions of the act constituting the court of appeals and its jurisdiction to review causes transferred to it from the supreme court.—*Brandenburg v. Reithman*, 7 Colo., 323. *Wyatt et al. v. Larimer and Weld Irr. Co. et al.*, 18 Colo., 298. *McClellan v. Hurd*, 21 Colo., 197. *Knowles v. Lower Clear Creek Ditch Co.*, 27 Colo., 469. *Bates v. Hall*, 44 Colo., 462. In determining this question we have to consider the peculiar nature of the property designated "a water-right," and the title thereto, as distinguished from land. This "right" is said to be intangible and incorporeal. The ultimate title or ownership of the water of the natural streams of this state is, by the constitution, vested in the public, but dedicated to the use of the people, subject to appropriation. In *Wheeler v. Northern Colorado Irr. Co.*, 10 Colo., 582, it is said that even after appropriation, this title, except perhaps as to the limited quantity that may be flowing in the consumer's ditch, remains in the general public, while the paramount right to its use continues in the appropriator. The right is usufructuary. There is no property in the corpus of the water so long as flowing naturally. There

is no property in the channel of the stream, and the water-right is distinct from the right to the ditch, canal or other structure in which the water is conveyed. The original right and title is secured by appropriation. In this case, the evidence of title, or of the right to use the water, is the decree of the court adjudging the amount of water which the several canals or ditches may take from the stream, and fixing their relative priorities. By these decrees the right to divert the waters from a stream is fixed at and limited to a certain point or place designated as the headgate of the ditch to which the award is made. Under the decisions of our courts, the public officers charged with the control of the distribution of water, may not recognize the right to change this point of diversion, or deliver the water at any other point than that named in the decree, until permission is granted by the court.—*New Cache La Poudre Irr. Co. v. Water Supply & Storage Co.*, 29 Colo., 469. But the right to change the point of diversion existed before the statute and has always been recognized in this state. It is a property right.—*Union Colony et al. v. Elliott*, 5 Colo., 371. *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo., 1. *Wadsworth Ditch Co. et al. v. Brown*, 39 Colo., 57. *New Cache La Poudre Irr. Co. v. Water Supply & Storage Co.*, *supra*. *Lower Latham Ditch Co. et al. v. Bijou Irr. Co.*, 41 Colo., 212. *Vogel et al. v. Minnesota Canal Co. et al.*, 47 Colo., 534. But it is a *qualified* right, and has always been made subject to the condition or provision that it can be exercised only in case it appears that such change will not impair or injuriously affect the vested rights of others.—*Fuller et al.*

v. Swan River Placer Co., 12 Colo., 12. *Lower Latham Ditch Co. v. Bijou Irr. Co.*, *supra*. Session Laws 1903, sec. 2, p. 278.

That a water-right is a freehold is not in doubt. Weil in *Water Rights in the Western States*, says: "A water-right of appropriation is real estate, independent of the ditch for carrying the water, and independent of ownership or possession of any land, and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose."

—Sec. 288. A water-right has been held to be a freehold or "real estate" in the following cases: *Wyatt et al. v. Larimer and Weld Irr. Co. et al.*, *supra*. *Insurance Co. v. Childs*, 25 Colo., 360. *Daum et al. v. Conley et al.*, 27 Colo., 56. *Knowles v. Lower Clear Creek Ditch Co., Id.*, 469. *Gutheil et al. v. Town of Montclair*, 32 Colo., 420.

The courts of this state, as well as of the state of Illinois, from which our acts conferring jurisdiction were copied, have frequently been called upon to decide whether, in the particular case then before the court, a freehold was involved, and while declaring that no general rule, applicable to the varying conditions of all cases, has been or perhaps can be formulated, have in many instances said in substance that a freehold is not involved unless the right or title to the freehold is the direct subject of the action—and not incidental or collateral; and that a freehold is never involved, within the meaning of the statute conferring jurisdiction to review a cause on appeal, unless the judgment necessarily takes from one and (or) gives to another party to

the action a freehold title.—*Harvey v. Travelers' Ins. Co.*, 18 Colo., 354. *McCandless v. Green*, 20 Colo., 519. *Callbreath v. Hug*, 48 Colo., 202. But it has generally been found expedient to determine the question solely with reference to the facts of the particular case under consideration.—*Wyman v. Felker*, 18 Colo., 382. *Knowles v. Lower Clear Creek Ditch Co.*, *supra*. *Murto, admr. v. King*, 28 Colo., 357. In the *Knowles* case it was said: "As applied to the facts in this case it is the actual effect (of the judgment) and not the result of a judgment which might be rendered, which furnishes the test of whether a freehold is involved or not. In other words, if the effect of the judgment upon the party seeking a review in this court has not been to deprive him of a freehold estate, then one is not involved, within the sense of the statute regulating appeals to this court."

Applying to this proceeding and judgment the rules hereinbefore stated, it appears (a) That title to the freehold is not the direct subject of the action. Title to petitioner's freehold is admitted by respondents. Title to respondents' freeholds is admitted by petitioner. All claim under the same general decree and their rights and titles are *res judicata* as among themselves, and attack thereon barred by the statutes of limitation, except perhaps for abandonment or fraud, which is not claimed in this case. Petitioner has not asked that he be awarded any part of respondents' freeholds, or any interest therein; nor do respondents claim to be entitled to any of the rights claimed by or decreed to the petitioner. (b) The decree does not purport to take from one party and (or) give to another party to

the action a freehold; or to impair, or diminish in quantity, the property of either. It expressly disclaims such purpose or effect, and is based upon the finding that the relief prayed for and granted will not injuriously affect any right of the respondents, except as to the interests of the Workman heirs which will be considered later. How, then, can it be said that a freehold is involved within the rules hereinbefore cited as applicable, even though the finding of the court be erroneous? The subject of the action is petitioner's freehold, not respondents,' nor one in which respondents claim any right, title or interest. The object of the action is to obtain judicial permission to use its own right at another place, which must be granted by the court unless the change results in injury to, or in other words, constitutes a trespass upon, respondents' rights. The question for determination was and is whether there was a trespass upon or injury to real estate, the right or title to which is not in dispute. Counsel for appellants claim that injury to a water-right cannot be compared with trespass to land, because damage by trespass leaves title to the land undisputed, while if the change of the point of diversion is made, and it necessarily works an injury, a portion of the freehold interest is taken—the *corpus* of the property is taken and not merely damaged. We perceive no material difference. The vital and controlling question, and the only one, decision of which is properly invoked or required by the issues presented (or, perhaps, that may be presented), is whether the change will injure the vested rights of respondents. Under the statute, if injury is not shown, the law gives the right to the change

and the court must declare it. If injury results it may be cured by the terms of the decree. But, if impossible to prevent or protect against injury, the decree is denied. Injury to real estate constitutes and is called "trespass;" and as applied to land, injury thereto is still trespass, and only that, even though the corpus thereof or a material part of it is actually taken or destroyed (as, by cutting timber, quarrying stone or removing soil.) The title remains undisputed. It seems to be generally held that a freehold is not involved in a suit for trespass to land.—*Trevett et al. v. Barnes et al.*, 110 N. Y., 500. *Hill v. Board of Water Commissioners*, 150 N. Y., 547. *Scully v. Sanders*, 77 N. Y., 598. *Brownmark v. Livingston*, 190 Ill., 412. *Greathouse v. Sapp*, 26 W. Va., 87. *Ponder v. Lard*, 102 Ky., 605. The question is *as to the injury*, and not *as to the title*.

The case of *Wyatt et al. v. Larimer and Weld Irr. Co.*, *supra*, cited and relied upon by counsel in support of their contention that a freehold is involved, while pertinent, we think is not conclusive. In that case the plaintiffs and others were the owners of certain water-rights under contract with an irrigation company, owner of the ditch, by which the company agreed to sell and convey to plaintiffs, water-rights, each of which represented 1.44 second feet of water, and whenever the company had sold rights equal to the estimated capacity of the ditch to furnish water, shares of stock of the company were to be issued for such water-rights. It was alleged that the company had sold water-rights equal to the capacity of the company's canal to furnish water, and that it and others named as defend-

ants had conspired for the purpose of selling additional water-rights, largely in excess of said capacity to furnish water, and in violation of said contracts, and that unless restrained defendant would carry out such purpose. Injunctive relief was asked. Demurrer to the complaint was sustained by the district court and its decision affirmed by the court of appeals. The supreme court, after declaring that plaintiffs' water-rights constituted a freehold estate, to-wit, an easement in the ditch, and that the subject-matter of the action was that estate, held that the acts threatened by the defendants, if carried out, would materially diminish plaintiffs' estate, and that the object of the action being to enjoin or prevent such diminution, the necessary result of the decree would be that "one party will gain and the other lose a material portion of such estate," and that, therefore, a freehold was involved. From a careful reading of the case, however, it will be seen that under the pleadings a construction of the contracts by which the defendant company agreed to sell and convey water-rights to plaintiffs, was invoked, and a violation of the terms of said contracts alleged; that the extent of the right and title to those water-rights, under the contracts for deeds therefor, was in dispute, the determination of which would give to one party to the action and take from the other, right and title to a material portion of water-rights which they claimed as against each other. In that respect we think the case is clearly distinguishable from the case now under consideration. Upon rehearing in the Wyatt case, the court, after reiterating its original declaration that the water-right was an easement in de-

fendant's ditch, also said that it was an easement in the stream, and that a change in place of diversion, or of use, does not affect this right either in character or extent. And it is said in *New Cache La Poudre Irr. Co. et al. v. Water Supply and Storage Co.*, 49 Colo., 1, that permission to make change in place of diversion in no way enlarges the rights of petitioner, either as to the volume of water or the time of its use.

The Workman heirs sustain a different relation to the petitioner than do the other appellants, as they were stockholders in the petitioner ditch company. The quantity of water to which they were entitled was determined by the court and adjudged to remain where it always had been. No exceptions were taken to this part of the decree, nor appeal therefrom. The appeal as to the heirs was from the conditions imposed by the court which were said not to be sufficient to prevent injury. It seems that the only matter to be reviewed as to them, is as to whether petitioner shall, after change is made, continue to maintain the old ditch for the use of the heirs, or contribute thereto; or, the heirs be relieved from assessments upon their stock in the company for maintaining the new ditch.

We fail to perceive that a freehold is involved as to any of the appellants, within the meaning of section 6 of the court of appeals act, and the motion to remand will therefore be denied.

[No. 3650.]

MONTE VISTA CANAL CO. ET AL. V. SAN LUIS VAL-
LEY IRRIGATED LAND CO.

In an appeal from a decree authorizing an irrigating company to change the place of diversion of the waters to which it was entitled the respondents challenged the validity or sufficiency of a deed under which the petitioner claimed title to a certain ditch and water right. Neither of these were claimed by any of the appellants, and the title being in issue only incidentally, it was held that no freehold was thus involved. A motion to remand the cause was, as to its other features, ruled by the judgment in *Monte Vista Company v. Centennial Company*, ante, 364.

Appeal from Costilla District Court. HON. CHARLES C. HOLBROOK, Judge.

MESSRS. CORLETT & CORLETT, MESSRS. GOUDY & TWITCHELL, for appellants.

Mr. JESSE STEPHENSON, for appellee.

KING, J., delivered the opinion of the court.

Motion is made to remand this cause to the supreme court for the reason that the decision necessarily relates to or involves a freehold. The judgment appealed from was rendered by the district court in a statutory proceeding for permission to change the point of diversion of decreed water-rights. So far as applicable to this motion, the facts and conditions are substantially the same as in case No. 3649, *The Monte Vista Canal Co. et al. v. Centennial Irrigating Ditch Co.*, decided at this term, with the exception that in the present case appellants have challenged the validity or sufficiency of a deed by which appellee claims title to an irrigation ditch and a water right, conveyed or attempted

to be conveyed to it by the town of Alamosa. This ditch or water right is not claimed by any of the appellants, and if the title thereto is in issue in this proceeding, it is only incidentally or collaterally so, and a freehold is not thereby involved.—*Harvey v. Travelers' Ins., Co.*, 18 Colo., 354. *McCandless v. Green*, 20 Colo., 519. *Callbreath v. Hug*, 48 Colo., 202. For the reasons more fully stated in *Monte Vista Canal Co. et al. v. Centennial Irrigating Ditch Co.*, *supra*, the motion herein to remand is denied.

[No. 3827.]

JEWEL V. SAIS.

1. **APPEALS**—*Transcript—Affidavit to Supplement*. The certificate to the transcript of record sent up from the trial court is not to be supplemented by an affidavit showing that a paper not embodied in the transcript was in fact certified to this court by the clerk of the trial court.

2. — **PRACTICE**—*Withdrawing Bill of Exceptions*. It seems that where what appears to be the appellant's bill of exceptions, but without attestation of the judge of the court below, is embodied in the transcript, the same may on motion be withdrawn for amendment. But where the appellant's bill of exceptions was not tendered to the judge below until after the lapse of the time allowed to file it, and it was then withdrawn for submission to the attorneys of the appellee, and under a date three months later it bore their approval but was never allowed or signed by the judge, nor certified to this court by the clerk below, it was stricken off on motion, without prejudice to appellant's right to apply to the court below for further action. Leave was also given to withdraw the transcript for a period named, and a further period was allowed to appellant to apply for leave to file a supplemental transcript.

Appeal from Morgan District Court. HON. H. P. BURKE, Judge.

Mr. JAMES E. JEWEL, *pro se*.

that the alleged bill of exceptions never became a part of the record in the court below, and is not properly in the records of this court. Appellee's motion to strike from the record that portion thereof denominated "defendant's bill of exceptions," is sustained, but without prejudice to appellant's right to apply to the court below for such further orders or action, as he may be advised. Appellant will be permitted to withdraw the transcript of the record for ten days, and is given thirty days in which to apply to this court for permission to file supplementary transcript. Appellee's further motion for an affirmance of the judgment of the district court, is, for the present, denied.

[No. 3851.]

HALL, RECEIVER, v. McINTOSH.

Judgment affirmed on the authority of *Hall v. Burrell*, ante.

Error to Otero District Court. HON. J. E. RIZER, Judge.

Mr. FRED A. SABIN, for plaintiff in error.

Mr. JOHN H. VOORHEES, for defendant in error.

Presiding Judge SCOTT delivered the opinion of the court.

This case involves the same question as in the case of *G. M. Hall, Receiver of the State Bank of Rocky Ford, v. Burrell*, decided at this term of court, and upon the authority of that case the judgment is affirmed.

All the judges concurring.

[No. 3312.]

COLORADO SPRINGS AND CRIPPLE CREEK RAILWAY CO.
v. NUGENT.

An appeal transferred from the supreme court to this court, in a cause in which no appeal lay to the former court, will, where no appearance has been entered for the appellee, be dismissed. The transfer of the cause does not affect its status.

Appeal from El Paso County Court. HON. ROBERT KERR, Judge.

Mr. E. E. WHITTED, Mr. R. H. WIDDICOMBE, Mr. A. S. BROOKS, for appellant.

Opinion per curiam.

This action was originally begun before a justice of the peace by appellee (plaintiff) against appellant (defendant) to recover for the killing of a cow by appellant. Plaintiff recovered judgment for \$50.00, from which an appeal was taken to the county court, where he again recovered judgment for \$40.00, from which this appeal is prosecuted. No appearance whatever has been made here by appellee. The judgment was rendered April 23rd, 1906; exclusive of costs was less than \$100.00; and does not relate to a franchise or freehold.

Under sec. 388, Mills' Annotated Code, the supreme court had no jurisdiction to entertain this appeal. The fact that the cause was transferred to this court under the provisions of the legislative act of 1911 does not change the status of the case. Therefore this court has no jurisdiction to consider the appeal. *Brady v. People*, 45 Colo., 364. *In re Catherine W. Skelton, deceased*, opinion C. A. (Colo.), May 13th, 1912.

Appeal Dismissed.

[No. 3363.]

FLEMING V. HOWELL.

1. TAX TITLES—*Tax Deed—Void*. A tax deed showing on its face the sale of several non-contiguous parcels of land *en masse* for a gross sum, or that, the sale being made to the county, the certificate was assigned by the county clerk more than three years after the tax sale, is void.
2. — *Deed Not Observing Statutory Form*. A tax deed omitting material recitations set down in the statutory form, e. g. that the lands had not been redeemed, is no evidence of title.
3. LIMITATIONS—*Void Deed*. A deed void upon its face does not set in motion the five years statute of limitations (Rev. Stat., sec. 5733).
4. — *Adverse Possession*, can not be established by inference or implication. An admission that defendant was in possession of the land for some time prior to the institution of the action is not sufficient.
5. — *Pleading*. The statute of limitations must be expressly pleaded.
6. — *Constructive Possession of Lands*. A void deed does not confer constructive possession of land. The paramount owner is in law, deemed to continue in possession until actual entry and possession taken by another, or until payment of taxes for the requisite period, concurrent with color of title made in good faith, as provided by the statute (Rev. Stat., sec. 4090) shall, in the case of vacant lands, have become equivalent in law to an actual ouster.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. THOMAS B. STUART, MR. CHARLES A. MURRAY, for appellant.

MR. R. H. GILMORE, *amicus curiae*.

MR. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

Appellee, as plaintiff, brought this action in the nature of ejectment, to recover from the defendant

four certain parcels of land situate in Washington county, alleging his title in fee simple and right to immediate possession, and that defendant wrongfully withheld possession thereof. The defendant, among other defenses, pleaded title in himself by virtue of several tax deeds, also color of title under one of said deeds, and invoked the bar of the statute of limitations, pleading and relying upon both the short statute as applied to actions for recovery of land sold for taxes (Rev. Stats., '08, sec. 5733; Mills' Ann. Stats., sec. 3904), and the seven-year statute, alleging his actual possession under claim and color of title made in good faith, with payment of all taxes legally assessed, for the full period required by said statute.—Rev. Stats., '08, sec. 4089.

Plaintiff deraigned title from the original patentee through several mesne conveyances. No serious objection was made to plaintiff's title, except that it was defeated by the several tax deeds and the statutes of limitation as hereinbefore set forth.

Defendant's several tax deeds were refused admission as evidence of title, but admitted for the purpose of showing color of title. Each was void on its face. The first deed, because it showed the sale to the county of several non-contiguous tracts of land, *en masse*, for a gross sum, and that the certificate of purchase, upon which the deed was based, had been assigned by the county clerk more than three years after the tax sale and issuance of said certificate.—*Emerson v. Shannon*, 23 Colo., 274. *Page v. Gillett*, 47 Colo., 289. *Hughes v. Webster* (Colo.), 122 Pac., 789, 790. *Carnahan v. Sieber Cattle Co.*, 34 Colo., 257. *Empire Ranch & Cattle Co. v. Coldren* (Colo.), 117 Pac., 1005. *McLaughlin v.*

Reichenbach (Colo.), 122 Pac., 47. The second deed was made pursuant to the same tax sale as the first, upon an assignment of the certificate made by the county treasurer, by authority of the board of county commissioners, but was void on its face because of the recital therein of the sale of non-contiguous tracts *en masse*, as in the first. The other two deeds omitted certain material recitations required by the statute to be made in the form prescribed for treasurer's deeds, to-wit, that the property had not been redeemed from tax sale as provided by law. The deeds were therefore inadmissible as evidence for the purpose of showing title.

Seven years and four months had elapsed after the first tax deed had been recorded, before suit was brought, and all taxes assessed upon said lands during that time had been paid by the defendant, but the deed, being void on its face, did not operate to set the five-year statute of limitations in motion.—*Gomer v. Chaffee*, 6 Colo., 314. *Page v. Gillett*, *supra*. *Sayre v. Sage*, 47 Colo., 559. *Hughes v. Webster*, *supra*.

The tax deed relied upon by the defendant gave him color of title from the date of its record.—*Morris and Thombs v. St. Louis National Bank*, 17 Colo., 231. *Sayre v. Sage*, *supra*. *Hughes v. Webster*, *supra*. But it is not necessary to decide whether the bar of the seven-year statute of limitations began to run from the date of such record, or whether the payment of taxes, admitted and otherwise established, was sufficient to constitute an effective bar to the suit, if compliance with other provisions of the said statute had concurred therewith; for, the evidence does not prove such concurrence. It does

not show when the defendant went into possession, nor that he was in the actual and continuous possession of said lands during the whole period of seven years mentioned. Actual adverse possession cannot be established by inference or implication. The admission that he was in possession at and for some time prior to the time when suit was commenced, was not sufficient. The nature of the defense relied upon required strict proof. There was a complete failure of such proof to establish the possession as alleged. This failure is not cured, nor avoided, nor is defendant in any way aided, by the doctrine of constructive possession, for his void deed did not give him such possession. On the contrary, the grantee of the original owner had constructive possession by virtue of a perfect legal title, and such possession is deemed to continue until interrupted by an actual entry and adverse possession taken by another (*Morris and Thombs v. St. Louis National Bank, supra*), or until the payment of taxes on vacant and unoccupied lands for the requisite period of years, concurrent with color of title made in good faith (as provided by sec. 4090, Rev. Stats., '08), shall have become equivalent in law to actual ouster or disseizin. The benefit of this latter statute was claimed by appellant in argument, but cannot be allowed, for the reason that its bar was neither raised by the pleadings nor sustained by the facts developed at the trial.

Express mention of other exceptions taken and assignments of error made by appellant, is unnecessary, by reason of decisions of the supreme court upon the questions involved, rendered since the briefs in this case were filed. And particular refer-

ence to the argument in the able and exhaustive brief of the *amicus curiae* is not made, for the reason that such brief is based upon, and the argument confined almost entirely to, those provisions of the statutes of limitation which are not properly raised by the pleadings nor sustained by the evidence herein, and therefore not applicable.

Finding no substantial error in the record, the judgment of the trial court will be affirmed.

[No. 3382.]

DALANDER V. HOWELL.

1. NOTICE—*Lis Pendens*. Notice of the pendency of a suit involving title to land, filed after the recording of a conveyance, is no notice to the grantee in such conveyance (Mills Code, sec. 36, Rev. Code, sec. 38).
2. JUDGMENT—*Upon Whom Binding*. A decree quieting title to lands is without effect as to one who, not having notice of the pendency of the suit, purchases from a defendant to the cause, by conveyance recorded before the filing of any notice of the pendency of such action.
3. TAX TITLES—*Void Deed*. A treasurer's deed of lands sold for taxes, reciting a sale to the county, and an assignment of the certificate of purchase by the county clerk after the expiration of three years from the date of the sale is void.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. AUGUST MUNTZING, MR. EGBERT MORE, for appellant.

MR. JOHN F. MAIL, for appellee.

Judgment affirmed.

WALLING, Judge.

This action was brought by the appellee, to quiet his title to two quarter sections of land in Washington county, against the appellant and others. The *prima facie* sufficiency of the proof introduced by the plaintiff, at the trial, to support the judgment in his favor, is not disputed by appellant. But it is claimed that the court erred in rejecting evidence offered on the side of the defendant, in support of the defenses pleaded in the answer. This evidence consisted of, first, the record of an action commenced in the county court of Washington county on July 7th, 1906, wherein Frederick H. Davis and Charles T. Kountze were plaintiffs, and W. H. Lanning, trustee, W. H. Carnahan, and others, were defendants, which appears to have been likewise an action to quiet the alleged title of the plaintiffs therein to the identical lands here in controversy; and, second, two instruments, purporting to be treasurer's deeds conveying to Frederick H. Davis and Charles T. Kountze the two quarter sections of land in question, that is to say, one deed, dated and recorded January 26th, 1901, for the northwest quarter of section 17, township 2 north, range 50 west, and the other, dated and recorded on the same date, for the northwest quarter of section 25, township 2 north, range 51 west, each of those deeds appearing from its recitals to be based upon a sale of the land therein described for taxes, as stated hereafter.

1. It appeared from the record of the action in the county court, between Davis and Kountze, plaintiffs, and Lanning, Carnahan, and others, defendants, that the plaintiffs therein recovered a judgment against all of the defendants, whereby it was

adjudged that the plaintiffs in that action were the owners in fee simple of the land here in controversy, and that the defendants therein had no right, title or interest to or in the same, etc. Neither appellant nor appellee was a party to that action, and no attempt was made on the part of appellant to show any privity with the plaintiffs in the county court action, when, or at any time after, it was commenced. The following facts, however, do appear from the bill of exceptions: Frederick H. Davis and Charles T. Kountze executed a special warranty deed, dated November 7th, 1905, conveying the same land to John Anderson and E. P. Dalander, which deed was recorded on December 8th, 1905, and it is admitted that afterwards Dalander succeeded to all the title of Anderson. Appellee claimed title to the land through a deed from Carnahan, one of the parties defendant to the action of Davis and Kountze in the county court, which deed was filed for record in the office of the recorder of Washington county on July 19th, 1906; while a notice of the pendency of the action of Davis and Kountze mentioned was filed in the same office on July 20th, 1906, and the judgment in that action was rendered October 3rd, 1906. It therefore appeared from the evidence in the case before us that appellee was a purchaser of the land pending the action in the county court, and there was no effort made to prove that he had actual notice of that action. The notice of suit pending, which was filed after his title was recorded, was of no avail to charge him with constructive notice. Mills' Ann. Code, sec. 36. In fine, there was nothing upon the face of the proceedings in the county court, and there was no proof *aliunde*, which could

make the judgment of the latter court competent evidence as between appellant and appellee.

2. It appears from the recitals contained in the supposed treasurer's deeds, which were offered as evidence by the defendant, that each was based upon a sale of the land therein described to the county of Washington on the 21st day of October, 1895, and the assignment of the respective certificates of sale by the county, "by its county clerk," to the grantees, on December 31st, 1900, and January 2nd, 1901. It has been frequently held that the recital in a treasurer's deed of the assignment of the tax sale certificate of purchase by the county clerk, after the expiration of three years from the date of the sale to the county, is fatal to the validity of the deed. The tax deeds were therefore properly excluded. *Empire etc. Co. v. Coldren*, 117 Pac., 1005. *Lambert v. Murray*, 120 Pac., 415. *Dimpfel v. Beam*, 41 Colo., 25.

The judgment will be affirmed. *Affirmed.*

[No. 3406.]

EMPIRE RANCH AND CATTLE CO. v. HOWELL.

1. TAX TITLES—*Void Deed*. A tax deed which recites a sale to the county, that the land was offered on a day named, and offered and re-offered "from day to day," until the same day first named, is void.
2. LIMITATIONS—*Payment of Taxes, After Action Commenced*, by the paramount owner avails nothing.
3. TRUSTEE'S DEED—*Recitations in*, are *prima facie* evidence of the facts recited.
4. — *Who May Question*. One showing no title to the lands described in a trustee's deed is not concerned with defects appearing therein, or in the antecedent proceedings.

5. APPEALS—*Harmless Error*. Appellant will not be heard to complain of the admission of testimony by which he can in no event have suffered prejudice.

6. JUDGMENT—*Void—Constructive Service of Process*. A decree upon substituted service of process, based on an affidavit which fails to give the post office address of defendant, or state that it was unknown to the affiant, is void.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

: CUNNINGHAM, Judge.

1. Appellee, as plaintiff below, brought his action in ejectment. The answer was a general denial. Six months thereafter the defendant company filed what is denominated a supplemental answer, wherein it sets up as a defense the payment of the taxes on the land in question for the year 1907, and on this new fact thus plead defendant attempts to invoke the seven-year statute of limitations. The payment of the taxes plead in the supplemental answer having been made after plaintiff filed his complaint, cannot avail the defendant as a defense, and we need not further consider any contention based on the statute of limitations.

2. On the trial plaintiff, to support his claim of title, introduced a patent from the government, a trust deed from the patentee, and a trustee's deed running to himself and based upon a foreclosure of the aforesaid trust deed. The trustee's deed contained the usual recitations authorizing the trustee, who was a substituted trustee, to act. Defendant strongly objects to the trustee's deed, insisting

that the recitations therein are not binding on it, since it, the defendant, claims paramount title by virtue of a tax or treasurer's deed. If the title of defendant be paramount, then it cannot be disturbed or injured by the introduction of the trustee's deed; at most its introduction would be immaterial. If the defendant's claim of title is bad, then it is not concerned with the defects, if any, in the trustee's deed, or the antecedent instruments and proceedings upon which it is based. *Foster v. Clark*, 21 Col. App. 192; 121 Pac. 130. Moreover, it has been expressly ruled in this state that the recitations of a trustee's deed are *prima facie* evidence of the facts therein stated, even where the deed of trust does not in terms so provide.

Carico v. Kling, 11 Colo. App., 350, and cases there cited.

No evidence having been offered by the defendant, tending in any wise to contradict or impeach the recitals in the trustee's deed offered by plaintiff, we must hold that he made sufficient proof of his title to put the defendant on his proof.

3. The defendant based its title on two tax deeds and a decree of the county court purporting to quiet title to the land in question in defendant. The decree of the county court plead was based on substituted service in which the affidavit for publication failed to state the post office address of the defendant, or that same was unknown to the affiant. Under the rule announced in *Empire R. & C. Co. v. Coldren*, 51 Colo., 115; 117 Pac., 1005, which rule has been later followed by the supreme court, the decree of the county court plead by the defendant was, because of the defect in the affidavit of pub-

lication, void and properly excluded by the trial court. There are other fatal defects pertaining to the decree of the county court, which we need not consider.

4. The first tax deed offered by the defendant was offered merely as color of title; therefore we need not further consider it. Indeed, it does not appear in the bill of exceptions, except by the merest reference. The second tax deed offered by defendant in support of its title is clearly void on its face for several reasons, but one of which we shall consider. According to the recitals in said deed, the land therein described and involved in this case, was sold to the county on the first day it was offered for sale. The recitals supporting this statement are (omitting unnecessary phrases) as follows:

“*WHEREAS* the treasurer of said county did on the 31st day of October, 1896 * * * severally expose to public sale * * * the several parcels of real property above described; * * * and whereas, thereupon the said treasurer * * * did offer and re-offer for sale from day to day until the 31st day of October * * * said treasurer did bid it off at such sale,” etc.

It is true the phrase “from day to day” would indicate that the land was offered for sale on different days, were it not for the fact that it appears clearly from the language preceding this phrase that October 31st (which it is recited was the last day of the tax sale) was the first day that the land in question was reached and offered in the tax sale proceedings.

The numerous opinions involving tax titles, and

questions pertaining thereto, that have been recently rendered by the supreme court, and by this court, make it unnecessary to pass upon all the questions that are presented by the record in this case. .

The judgment of the trial court is correct, and should be affirmed. *Affirmed.*

Decided June 10, A. D. 1912. Rehearing denied July 8, A. D. 1912.

[No. 3416.]

EMPIRE RANCH AND CATTLE CO. v. ELLIS ET AL.

QUIETING TITLE—*Plaintiff's Title*. A defendant who shows no title in himself will not be heard to raise objections to the title of plaintiff. *Foster v. Clark*, 21 Col. Ap., 192, followed.

Appeal from Yuma County Court. HON. J. S. HENDRIE, Judge.

Mr. AUGUST MUNTZING, Mr. EGBERT MORE, for appellant.

Mr. ISAAC PELTON, for appellees.

Per Curiam.

Appellant, as plaintiff below, brought this action in the county court of Yuma county to quiet title to certain lands in Yuma county. Defendants Ellis and Clark answered, and also by cross complaint asked that title to the land in question be quieted in them. Shea disclaimed. On the trial plaintiff offered two certain tax deeds which were held by the court to be void on their face, and therefore inadmissible. These deeds, so offered by plain-

tiff, constituted its sole evidence of title. They were each void on their face for various reasons not necessary to point out. Indeed, appellant makes no claim in its brief to the contrary, but contents itself with certain objections to appellees' title which cannot be raised by appellant, under the ruling in *Foster v. Clark*, 21 Col. App., 192; 121 Pac., 130.

The judgment of the county court is affirmed.

Affirmed.

[No. 3417.]

EMPIRE RANCH AND CATTLE CO. v. HERRICK ET AL.

1. *APPEAL—What May Be Assigned for Error.* One who shows no title to lands will not be heard to complain of a decree quieting title in his adversary.

2. — *Technical Defenses Disregarded.* Errors not effecting the substantial rights of parties are to be disregarded. Acts 1911 c. 6, sec. 20.

3. *NON-SUIT—Time to Move for.* The phrase "before trial" in clause 1 of sec. 183, Revised Code, means before the commencement of the trial. Plaintiff is not entitled to move for a non-suit during the course of the trial.

4. — *Abandonment of Cause.* A motion by the plaintiff for a non-suit is not an abandonment of his cause within the meaning of clause 4 of sec. 183 of the Code.

5. *QUIETING TITLE—Nature of the Action.* Bills to quiet the title to lands are properly classified as actions *in rem* or *quasi in rem*. They retain their equitable character though so enlarged by statute as to give the remedy to one out of possession. When the defendant appears and submits his title to the court each party is an actor, and both may fail.

6. — *Relief Granted to Defendant—Pleading.* The court may quiet title in defendant even though the answer prays no relief.

The answer is to be regarded as a cross-complaint.

7. — *Voluntary Non-Suit—Effect.* A voluntary non-suit taken by plaintiff who has presented no title to the lands in con-

troversy, in no manner deprives the court of jurisdiction to quiet the title of the defendant.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

MR. AUGUST MUNTZING, MR. EGBERT MORE, for appellant.

MR. JOHN F. MAIL, for appellees.

CUNNINGHAM, Judge.

The appellant instituted its action in the county court to quiet title to certain lands. From an adverse judgment, it appealed to the district court, where again judgment went against it, from which latter judgment this appeal is prosecuted.

The complaint alleged that the plaintiff was the absolute owner and in possession of the lands in question, but made no other reference to the nature or character of its title. The answer alleged that the defendants were the owners in fee simple of the land by various mesne conveyances from the government, but contained no prayer and asked for no relief. In the replication plaintiff alleges that its title is based upon a tax deed, and the five and seven-year statutes of limitation are plead, but whether these statutes are well plead, it is not necessary to determine.

On the trial in the district court, appellant, for the purpose of proving title to the land in question, offered in evidence its tax or treasurer's deed. Objection to the introduction of said deed was interposed by counsel for defendants (appellees) on the ground that the deed was void on its face. The trial judge sustained the objection, whereupon coun-

sel for plaintiff advised the court that it desired to submit to a voluntary non-suit, and accordingly a judgment of non-suit was entered against it. Thereupon, defendants asked leave to prove their title to the land in controversy, and have the same quieted as against the treasurer's deed held and offered by the plaintiff. Plaintiff objected to any further proceeding after non-suit had been entered against it, and in the brief no other question is argued. The deed offered by the plaintiff corporation was clearly void on its face, for various reasons, which fact is practically conceded by the appellant.

1. The only question before us for determination is, was the trial court warranted in taking proof, after having entered a non-suit against the plaintiff, for the purpose of determining whether the defendants had good title to the land, and thereafter, having found that the defendants did have good title to the land, was the trial court warranted in entering a judgment in their favor, quieting their title as against the treasurer's deed then held by the plaintiff? The only title that appellant claims was based upon the void tax deed. When, at its own request, it was non-suited, it went out of court voluntarily, and, having no title whatever to the land (the seven-year statute of limitations not having run) it was not injured by the decree which the trial court thereafter rendered in favor of appellees. Even if the trial court went too far in rendering a decree in favor of appellees, appellant is in no position to complain.

"In any event, we do not regard the appellant as in a position to complain of the judgment quieting the defendants' title, when it was found to have

no title or interest in the property. It was adjudged to belong to the defendants, and appellant is unharmed by the decree. Should the judgment appear to affect the rights of other persons, who were not parties to the suit, and the judgment is a cloud upon their title, they would, of course, be unaffected by it, and in a proper way could remove it." *Baca v. Wootton*, 8 Colo. App., 96. *Foster v. Clark*, 21 Col. App., 192; 121 Pac., 130.

2. In view of the conclusions we have already announced, the controversy over the non-suit might be left undetermined, but inasmuch as counsel have vigorously pressed this matter upon our attention, we have concluded to consider and dispose of it.

Counsel for appellant say that the non-suit in this case was had under the 4th subdivision of sec. 166 of the code (sec. 183, Rev. Code), which subdivision reads as follows:

"An action may be dismissed or a judgment of non-suit entered * * * *FOURTH* — By the court, when upon trial, and before the final submission of the case, the plaintiff abandons it."

The first subdivision of sec. 166 provides for a non-suit on motion of the plaintiff, at any time *before trial*, and upon payment of costs, providing a counter-claim has not been made. The non-suit contemplated by the 4th subdivision of sec. 166, which we have just quoted, is by the court—in the court's discretion—providing the plaintiff has *abandoned* the case. The non-suit in this case was entered *upon* the trial and not *before* the trial, and before the plaintiff had abandoned the case, since it was entered upon its motion and its earnest and repeated request. The motion for non-suit can be

no more than an *offer* to abandon, at most; it is not an abandonment of the case, for if the non-suit be denied, the plaintiff may conclude to remain in the case and contest it to the end. Hence the code provision invoked by appellant affords it no shelter, as we read the record. We think the appellant had no right under the code to move for a non-suit upon the trial, or during the course of the trial, and the court should have denied its motion. The phrase, "before trial," as used in the first subdivision of sec. 183 (Rev. Code) does not mean before the conclusion of the trial, but before the commencement of the trial.

Winship v. People, 51 Ill., 298. *Flemming v. Fire Association*, 76 Ga., 679. *Jifkins v. Sweetzer*, 102 U. S., 179. *Bettis v. Schreiber*, 31 Minn., 331.

In the last authority cited, the supreme court of Minnesota says:

"After the plaintiff had rested, and one witness had been examined on behalf of defendant, plaintiff interposed a motion to dismiss the action, which was overruled by the court. The plaintiff bases his right to dismiss upon Gen. St. 1878, c. 66, sec. 262 subd. 1, and insists that the words 'before trial' in that section, mean before the submission of the case to the court or jury. But this would evidently do away with any distinction as respects the time for such dismissal by the plaintiff, between subdivisions 1 and 3 of the section."

(Subdivisions 1 and 3 of the Minnesota statutes referred to are almost identical with subdivisions 1 and 4 of our code provision to which we have already called attention.) (Continuing the Minnesota supreme court, in the Bettis case, says:

"The words 'before trial' mean before the commencement of the trial."

But whether our conclusion in this respect be universally applicable to motions for non-suit when made by a plaintiff, there can be no doubt of its soundness when applied to actions to quiet title. Such proceedings are, in a sense, *sui generis*. By the weight of authority actions to quiet title are properly classified as actions *in rem*, or *quasi in rem*. 17 Enc. Pl. & Pr., 294. Black on Judgments, vol. 2 (2nd ed.), sec. 793.

Nor do such actions lose their equitable nature because, by statute, the procedure has been somewhat modified, and its scope enlarged so as to permit them to be pursued by a plaintiff out of possession.

Costello v. Mulheim, 9 Ariz., 422; 84 Pac., 906. Proceedings of this nature may be instituted under the code (sec. 274, Rev. Code) for the sole "purpose of determining such adverse claim, estate or interest" as the defendant (wrongfully, as plaintiff must allege) asserts.

"The broad grounds on which equity interferes to remove a cloud on title, are the prevention of litigation, the protection of the true title and possession, and because it is the real interest of both parties, and promotive of right and justice that the precise state of the title be known, if all are acting *bona fide*." 32 Cyc., 1306.

Inasmuch as the public is interested in having disputed land titles adjudicated, and all doubt with reference to them set at rest, actions to quiet title are, in certain respects, closely akin to adverse proceedings, wherein "each of the parties are actors

and both may fail," *Duncan v. Eagle Mining Co.*, 48 Colo., 587. *Walters v. Webster* (No. 6816 Colo.) *Clark v. Huff*, 49 Colo., 197, providing defendant appears, as he did in this case, and submits to the court his own title.

Defendant was haled into court, not that a money judgment might be taken against him, but for the sole purpose of compelling him to exhibit his title to the land to which plaintiff assured the court it held the superior title. Defendant appeared, and by answer set forth his title. It seems under the ruling in *Lambert v. Murray*, 120 Pac., 417, a case recently determined by our supreme court, that it is not necessary that defendant's answer should close with a prayer for relief, since, as the court announces in that case:

"The determination of the adverse title would necessarily result in just what the defendant asked for, if he sustained his answer, so that his prayer asked for no other relief than he would have been entitled to if he had merely alleged his adverse title and omitted the prayer."

This quotation from the *Lambert* case indicates, if it does not indeed hold, that every answer by a defendant in an action to quiet title, wherein the defendant asserts title in himself, should be treated as a cross-complaint, or at least that the case should proceed in all respects as though the answer had contained a formal cross-complaint and demand for relief thereon. The plaintiff in the instant case seems to have so regarded the defendant's answer, for it filed an exhaustive reply thereto, in which reply it set up in detail, with great minutia, the character and nature of its title, and also sought

to plead the statute of limitations. "The plaintiff having submitted its tax deed to the judgment of the court, when it offered it as evidence of title, and the same having been found invalid and excluded by the court, it could no longer be used in support of its title, and, since it constituted a menace to defendant's title, it was the duty of the court, upon the case presented, to order it delivered up and cancelled, and as the court amply protected the plaintiff for all the moneys paid out by him upon his tax title, he is not entitled to complain of this part of the decree. The code provides that the court shall disregard errors and defects not affecting the substantial rights of the parties. The substantial rights of the parties to this case have been properly determined, and we think the court properly ordered the cancellation of the tax deed as a part of its judgment." *Rustin v. M. & M. T. Co.*, 23 Colo., 351-8.

As a further indication of the growing prejudice against technical defenses, our legislature, at the last session, passed the following provision:

"It (the supreme court) shall disregard any error or defect in the proceeding which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Sec. 20, chap. 6, Session Laws 1911.

Had the trial court adopted the view of appellant, and held that the granting of its non-suit abruptly extinguished the case and deprived the court of all authority or right to further proceed, the result must have been that appellee would have gone out of one door of the court only to re-enter by another as plaintiff in an action that must have re-

sulted in precisely the same thing, viz., the cancellation of appellant's void tax deed—the only title it has ever asserted. To require so unnecessary a procedure could in no possible manner protect the substantial rights of appellant. Our code provides:

“The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights.” (Sec. 16, Rev. Code.)

And by sec. 241, our code provides that:

“Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.”

Having forced defendant to bring his title into court for the purpose of having it measured against its own, we think plaintiff had no right, when it had obtained a ruling from the trial court that the only title which it plead was void, to flee the court, bearing away the very thing it had submitted for determination—its worthless evidence of title. Having prevailed upon the trial court to enter a non-suit against it, when no such order should have been granted, appellant is in no position to complain of its self-imposed exile from court, even if thereby it suffered injury. But, having no title, it was quite as effectually out of court, for all practical purposes, before as it was after the granting of its motion for a non-suit, hence it is difficult to perceive how its substantial rights have been in any wise invaded by the proceedings which followed the improper entry of non-suit.

The judgment should be affirmed.

It is conceded by the attorneys for appellant, and the attorney for appellees, that the facts involved in this case are precisely the same as the facts involved in *The Empire Ranch and Cattle Company v. William M. Little, et al.*, No. 3418, and *The Empire Ranch and Cattle Company v. Lardner Howell, et al.*, No. 3419, now pending in this court. Therefore, the judgments in each of the two last named cases will be affirmed on the authority of the instant case.

Judgment affirmed.

[No. 3418.]

EMPIRE RANCH AND CATTLE CO. v. LITTLE ET AL.

Judgment affirmed on the authority of the opinion in No. 3417 ante.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

MR. AUGUST MUNTZING, MR. EGBERT MORE, for appellant.

MR. JOHN F. MAIL, for appellee.

Per curiam.

Judgment affirmed on the authority of *The Empire Ranch and Cattle Company v. Herrick et al.*, No. 3417.

Affirmed.

[No. 3419.]

EMPIRE RANCH AND CATTLE CO. v. HOWELL ET AL.

Judgment affirmed on the authority of the opinion in No. 3417 ante.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. AUGUST MUNTZING, Mr. EGBERT MORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

Per curiam.

Judgment affirmed on the authority of *The Empire Ranch and Cattle Company v. Herrick et al.*, No. 3417. *Affirmed.*

[No. 3421.]

BLOOMER v. JONES.

1. BILL OF EXCEPTIONS—*When Necessary.* Where, in an action to quiet title to lands, the plaintiff derails title under a sale assumed to be made pursuant to the power of sale contained in a trust deed, and the bill of exceptions fails to set forth either the deed of trust or the trustee's deed thereunder, and neither is elsewhere found in the record, it will be assumed that these documents were properly admitted in evidence, without evidence aliunde of compliance with the powers of the deed of trust.

A stipulation of counsel that the papers may be omitted from the bill of exceptions does not affect the question.

2. COUNTY COURT—*Jurisdiction—Value Involved—Pleading.* In an action in the county court to quiet title, or otherwise affecting title to land, the jurisdiction of the court must appear by an averment that the value of the property in controversy does not exceed \$2,000 (Rev. Stat., sec. 1527). It is not required that

the words of the statute be literally followed, but if other words are adopted they must be of equivalent effect.

In a complaint, in an action to quiet the title to lands no money judgment being demanded, an averment that "the amount herein involved and sued for does not equal \$2,000," gives no indication of the value of the land, and is not a compliance with the statute. A decree given upon such complaint is void, and may be collaterally assailed.

3. JUDGMENT—*Collateral Attack*. A judgment of the county court upon a complaint which omits the statutory allegation as to the value in controversy is open to collateral attack.

4. APPEALS—*Brief*. Errors not discussed in the brief of appellant will not be considered.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. AUGUST MUNTZING, Mr. EGBERT MORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

HURLBUT, J.

Action to quiet title, by appellee (plaintiff) against appellant (defendant).

Objection was made by appellant to the admission in evidence of the trustee's deed which conveyed the disputed premises to plaintiff. He contends that because of the fact that appellant and appellee de-raigned title from different sources all prerequisites contained in the trust deed which authorized the trustee to foreclose the same should have been shown by competent testimony prior to its introduction in evidence. As to this contention, we can only say that neither the trust deed nor the trustee's deed is incorporated in the bill of exceptions, nor can either thereof be found in the record of this case. We have no knowledge or information concerning

their contents. For all that appears here, recitals therein may have rendered it unnecessary to show any of such matters by evidence *aliunde*. The record discloses a stipulation between the parties to the effect that they need not be copied in the bill of exceptions. Not having the deeds before us we do not feel justified in passing on the court's action in admitting them in evidence, and will assume that they were properly admitted.

Appellant further insists that the court erred in refusing to admit in evidence the decree and court files of the county court of Yuma county, which purported to quiet title to the premises in one Muntzing. The determination of this question is decisive of this appeal. Appellee insists that the court had no jurisdiction to render the decree, and that all proceedings in the case were wholly void, and ineffective to confer any title whatever in the premises on said Muntzing. The point on which appellee relies is that the complaint failed to state that the value of the property in controversy did not exceed the sum of \$2,000. The constitution provides that the county court shall have no jurisdiction in any case where the debt, damage or claim, or value of property involved, shall exceed \$2,000, except in cases relating to the settlement of estates of deceased persons. In harmony with this constitutional provision the legislature enacted sec. 1055, Mills' Annotated Statutes, which reads as follows:

"In order to give the said courts jurisdiction in any action, suit or proceeding, the complaint or complaints shall state that the value of the property in controversy or the amount involved for which relief is sought in such action, suit or proceeding,

does not exceed the said sum of two thousand (2,000) dollars," etc.

Home et al. v. Duff et al., 5 Colo. 574, involved the title to mining property, the case having been tried in the county court. The supreme court reviewed the judgment on error and held that as the complaint failed to state that the value of the property in controversy did not exceed the sum of two thousand dollars the county court possessed no jurisdiction to hear the case and render judgment. To the same effect: *Learned v. Tritch*, 6 Colo., 432; *Hughes v. Brewer*, 7 Colo., 583.

It is clear from the statute and authorities cited that the jurisdiction of the county court depends on a statement which must appear in the complaint. If the action be one to recover a money judgment, the complaint must state that the amount involved, for which relief is sought, does not exceed \$2,000, unless it be otherwise shown therein that such is the fact. If the proceeding be a suit in equity, or an action at law affecting real or personal property, then the jurisdiction of the court to act in the premises must appear from a statement in the complaint to the effect that the value of the property in controversy does not exceed the sum of \$2,000. We must not be understood as holding that the exact wording of the statute must be followed. If the statute be not followed *in haec verba*, then the substituted statement must be equivalent in meaning and effect.

In the case at bar the county court complaint offered in evidence in the court below failed to show that the value of the property in controversy did not exceed the sum of \$2,000. This omission was

fatal to the decree of that court. The phrase found in the complaint, "that the amount herein involved and sued for does not equal nor exceed the sum of two thousand dollars," was not a compliance with the statute. No money judgment was demanded. Whatever the amount involved and sued for might have been, it was no indication of the value of the disputed premises. The jurisdictional statement in the complaint, and not the *ad damnum* clause, must be looked to to ascertain the court's jurisdiction.

Appellee contends that while the law may be as above stated, the record shows that the objection to the admission of the county court decree and files was a collateral attack upon the same, and that, inasmuch as the county court has concurrent jurisdiction with the district court within its prescribed limitation, the law will presume the decree to be valid as against such attack. The case of *Bateman v. Reitler*, 19 Colo., 547, was one considered by the supreme court on error to the district court. It was a case which related to a collateral attack upon a judgment of the county court of Jefferson county, which judgment involved real estate. Justice Hayt, speaking for the court, uses this language:

"If the court administering upon the estate had jurisdiction of the subject matter and of the parties, its orders and judgments are not open to attack in this proceeding."

The absence of the above mentioned jurisdictional clause from the county court complaint showed on its face that that court had no jurisdiction of the action. The decree founded thereon could be collaterally attacked. *Trowbridge v. Al-*

len, 48 Colo., 419; *Empire Ranch & Cattle Co. v. Coldren* (Colo.); 117 Pac., 1005.

Appellant in his original brief did not make the slightest allusion to the rulings of the court upon other alleged errors, and particularly to that excluding from evidence the tax deed offered by appellant in support of his case. Appellee, however, discussed at length the rulings of the court in that behalf, to which appellant filed a reply brief, and again ignored the question. We have heretofore held that errors assigned but not discussed in the briefs will not be noticed. Hence we assume that the district court properly excluded the tax deed from evidence when offered.

In view of the conclusions above expressed the trial court did not err in excluding from evidence the decree and files of the county court of Yuma county.

Judgment Affirmed.

[No. 3443.]

MODERN BROTHERHOOD OF AMERICA V. LOCK ET AL.

1. FRATERNAL SOCIETIES—*Benefit Certificate a Policy of Life Insurance.* It is settled law in this state that the benefit certificate of a fraternal order, is, so far as regards the insurance features thereof, a policy of life insurance, and subject to the same statutory regulations and limitations as those of old line and mutual assessment companies, unless expressly excepted therefrom by statute, and that the act of April 11, 1903 (Laws 1903, c. 119) applies thereto.

2. LIFE INSURANCE—*Suicide as a Defense—Statute Construed.* It seems that under sec. 1, and clause 1 of sec. 73, of chapter 193 of the Laws of 1907 (Rev. Stat., secs. 3087, 3160) suicide of the insured would be a defense to an action upon a certificate issued by a fraternal order, since that enactment.

But policies issued while the prior enactment was in force (Laws 1903, c. 119), are controlled by that enactment.

That statute not only made void any provision of the policy exonerating the insurer, in case of suicide of the insured, but in legal contemplation the statutory prohibition was substituted therefor, and became an affirmative covenant of the insured that the defense should never be made. The act of 1907 is not to be accepted as a legislative construction of the act of 1903, opposed to that of the supreme court, but rather as a recognition of that interpretation as of universal application to contracts of insurance, and as a positive enactment limiting the prohibited features of the policy to insurance companies, other than those named in sec. 73 of the Insurance Code.

And the repeal of the act of 1903 by the act of 1907 did not affect benefit certificates issued prior to such appeal, nor as to these revive a defense which the statute had taken away.

3. — *Waiver of Statute.* The parties to the contract of life insurance can not by any prior or contemporaneous agreement waive the statutory inhibition against the defense of suicide.

4. *STATUTE—Repeal—Effect.* The repeal of a statute which has become a constituent part of a contract will not be construed as retroactive, unless the legislative intention that it should so operate is clearly shown.

5. *CONSTITUTIONAL LAW—Particular Statutes.* The statute providing that the suicide of the holder of a life policy whether voluntary or not, shall not be a defense to an action upon the policy (Laws 1903, c. 119) is not in contravention of any provision of the state or federal constitution.

Appeal from El Paso District Court. HON. J. W. SHEAFER, Judge.

Mr. J. E. E. MARKLEY, Mr. W. M. SWIFT, Mr. J. E. MCINTYRE, for appellant.

MESSRS. ORR & CUNNINGHAM, Mr. H. M. MASON, for appellees.

KING, J., delivered the opinion of the court.

Plaintiffs brought their suit to recover from The Modern Brotherhood of America, a corporation organized and existing under and by virtue

of the laws of the state of Iowa, engaged in the business of insuring the lives of its members through its subordinate lodges, upon a contract of insurance denominated a "membership certificate," dated January 21st, 1904, issued by the defendant corporation to William B. Lock, payable upon his death to his son and daughter, the plaintiffs herein. The insured committed suicide on or about December 19th, 1907. The certificate contained an express provision that if the holder thereof should die by his own hand, whether sane or insane, the certificate should be null and void; and the written application for said membership certificate, which, by the terms of both the application and the certificate, was made a part of the contract of insurance, contained an agreement that in case of death of the member by suicide, the certificate should thereby become void. Defendant relied upon such forfeiture as its defense.

The case was submitted for determination upon a stipulation in writing which, among other things, contained the following: "That except for the fact that said William B. Lock committed suicide, the plaintiffs in this action would be entitled to recover the sum of two thousand dollars at and of the date of the commencement of this suit; that proof of loss was duly made by the beneficiaries herein named, and the payment of any sum herein was refused by the defendant association upon the sole ground that because William B. Lock had committed suicide the certificate was forfeited, and there was no liability on the part of the defendant association to pay the beneficiaries therein named any sum whatever. * * * It is therefore mutually agreed between the parties that this cause shall be submitted

upon the pleadings and this stipulation of facts, and that if the court shall decide that the law of Colorado providing that suicide shall not be a defense against the payment of a life insurance policy, is constitutional, and second, that it applies to the defendant association, then the court shall render judgment against the defendant company in the sum of two thousand dollars, with interest from the date of the commencement of this suit; otherwise judgment shall be for defendant." Plaintiffs had judgment.

Appellant contends (a) that it was not a life insurance company; (b) that the certificate of membership sued upon was not a life insurance policy, nor the member a policy holder; (c) that the act of April 11th, 1903, providing that thereafter the suicide of a policy holder of any life insurance company doing business in this state, shall not be a defense against the payment of a life insurance policy, did not apply to the defendant, a fraternal beneficiary association; (d) that if such act was applicable to the defendant, it was unconstitutional and void; (e) that the said act of 1903 was repealed by section 73, chapter 193, session laws of 1907, and therefore its provisions were of no force or effect to bar the defense of suicide.

By the decision of the supreme court in *Head Camp Woodmen of the World et al. v. Sloss*, 49 Colo., 177, following and approving decisions of the same court in *Chartrand et al. v. Brace*, 16 Colo., 19, and *Supreme Lodge, Knights of Honor, v. Davis*, 26 Colo., 252, 257, it has become settled law in this state that as regards the insurance feature, the defendant company was an insurance company, and

its contract of indemnity, by whatever name it may be called, a life insurance policy, and the holder thereof a policy holder, and such contract subject to the same statutory regulations and limitations as those issued by old-line and mutual assessment companies, unless expressly exempted therefrom by statute; and also, that the suicide statute of 1903 applied to such contracts and associations or companies, there being therein no exemption in favor of fraternal associations doing an insurance business. That the act was not void as being in contravention of the provisions of either the state or the federal constitution is also settled by the same authority, and by the decision of the supreme court of the United States in *Whitfield v. Aetna Life Ins. Co.*, 205 U. S., 489. It is therefore obvious that the liability of the defendant depends upon the effect to be given to the act of 1907, effective July 1st of that year, by which the act of 1903 was repealed.

The act of 1903 was a separate, independent and complete enactment in and of itself, and in no sense amendatory of any previous legislative enactment (*Woodmen v. Sloss, supra*), the language thereof being as follows: "From and after the passage of this act the suicide of a policy holder of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy holder was sane or insane."—Session Laws 1903, p. 257.

The general assembly of 1907 revised, amplified and codified the insurance laws by chapter 193, session laws of that year. By section 74, clause

15 of said chapter, the act of 1903 was specially repealed, and with slight modification, was substantially re-enacted as section 55 of said chapter, in the following words: "From and after the passage of this act, the suicide of a policy holder *after the first policy year*, of any life insurance company doing business in this state, shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy holder was sane or insane." It will be observed that said section, by the new enactment, is no longer a separate and independent enactment in and of itself, as was said by Mr. Justice Bailey of the act of 1903, but is a component part of an entire chapter or code dealing generally with the subject of insurance, and subject to such limitations as are contained therein and applicable thereto. The first section of said chapter provides, "That in this act, unless the context otherwise requires, 'Company' or 'Insurance Company' shall include all corporations, partnerships, associations or individuals, engaged as principals in the insurance business, *excepting fraternal and benevolent orders and societies*," and subdivision (1) of section 73 is as follows: "The provisions of this act shall not be construed so as to prevent any fraternal, religious or benevolent societies which conduct their business as fraternal societies, under the lodge system, * * * or to those which limit their certificate holders to a particular order or fraternity, from issuing indemnity to any person, against loss by death, sickness or accident of any of its members; *and such society shall not be held amenable under, or governed by any of the provisions of any of the*

sections of this act pertaining to accident, health or life insurance." * * * And if the contract or policy of insurance sued on herein had not been entered into prior to the passage of the act of 1907 mentioned, its effect upon this suit might and probably would be as now contended for by the defendant. But we think decision of the present suit does not depend upon, and is not controlled or affected by, the repeal of the 1903 statute. We cannot agree with counsel for appellant in his position that because the suicide statute is remedial, its repeal in 1907, subsequent to the contract of insurance and prior to the death of the insured, operated to make the defense of suicide available to the defendant in this case. The statute of 1903 not only made void and of no effect that portion of the policy or agreement relative to death by suicide, thereby leaving the contract silent on that subject, but in legal contemplation the inhibition of the statute was substituted for the void clause and became an affirmative covenant, binding upon the parties, that as to that policy suicide could never be made a defense.—*Jarman v. Knights Templars etc. Co.*, 95 Fed., 70, 73; *Cravens v. N. Y. Life Ins. Co.*, 148 Mo., 583. *Equitable Life Assurance Society v. Clements*, 140 U. S., 226, 233. *McCracken v. Hayward*, 2 How., 608, 612. *State v. Berning*, 74 Mo., 87. And it is clear that such contract, with the statute so read into it, is not against sound morals, public policy, justice or right.—*Whitfield v. Aetna Life Ins. Co.*, *supra*.

The object of the statute and the legislative intent, as tersely expressed by the late Mr. Justice Harlan, in the Whitfield case, *supra*, was to "cut up by the roots" any defense grounded upon the fact

of suicide, and to make any inquiry as to suicide immaterial, and any contract, inconsistent with the statute, void. And as said by Mr. Justice Bailey in the *Sloss* case, *supra*, to declare that it is against public policy to permit insurance companies to contract against the payment of their policies because the insured came to his death by his own hand.

Nor do we agree with counsel for appellant that the act of 1907 is to be taken as a legislative construction of the act of 1903, different from the construction placed thereon by the supreme court, and therefore to be accepted by the courts as the law; but rather, as a recognition of the law as interpreted and applied in the *Chartrand* and *Knights of Honor* cases as of practically universal application to insurance contracts, and a positive enactment limiting its prohibitive features thereafter to insurance companies other than those named in section 73 of the insurance code.

That the subsequent repeal of a statute, the provisions of which have become a constituent part of a contract such as this, will not be construed as retrospective in its operation, unless its terms clearly show a legislative intention that it should so operate, is so well settled as to have become elementary; and it is equally certain that in this state, and in others having like constitutional provisions, such statute, if it attempted to destroy the protective provisions of a former statute, would be in contravention of the constitution of the state, as well as of the provisions of the federal constitution which prohibit the states from passing any law impairing the obligation of contracts.—*Gilliland et al. v. Phillips et al.*, 1 S. C., 152, 154. *Robinson v. Barrows*,

48 Me., 186. *Ludlow v. Hardy*, 38 Mich., 690, 692. *Mays, admr. etc. v. Williams*, 27 Ala., 267, 271. *Wisdom v. Reeves*, 110 Ala., 418, 430. *Jarman v. Knights Templars etc. Co.*, *supra*.

The repeal of the prohibitive statute cannot make valid, or breathe vitality into, a contract that was void when made because in violation of the statute.—*Gilliland et al. v. Phillips et al.*, *supra*. *Ludlow v. Hardy*, *supra*. Nor can the statutory inhibition be waived, or abrogated by agreement of the parties made prior to or contemporaneous with the contract of insurance.—*Head Camp Woodmen of the World et al. v. Sloss*, *supra*. *Whitfield v. Aetna Life Ins. Co.*, *supra*.

From what has been said it necessarily follows that the judgment of the trial court was right and must be affirmed, and it is therefore unnecessary to consider in this opinion the question so ably and exhaustively presented in the briefs of counsel as to the appellant's having, by the pleadings and stipulated facts, shown itself to be within the class of associations exempted by sections 1 and 73 referred to. Our conclusion must be understood as applicable only to insurance contracts entered into prior to the taking effect of the insurance code. The judgment is affirmed.

CUNNINGHAM, J., not participating.

[No. 3448.]

HENDRIE ET AL. V. ACORN GOLD MINING CO. ET AL.

APPEALS—*Appeal Docketed as a Writ of Error*. In an appeal to the supreme court in a cause where no appeal was allowed by law, the appellee appeared and filed his brief and the

cause was ready for final hearing. In this condition it was transferred to this court. On motion to dismiss, the appeal was docketed as a writ of error, under sec. 423, Rev. Code.

Appeal from El Paso District Court. HON. J. W. SHEAFOR, Judge.

Mr. TULLY SCOTT, County Attorney, Messrs. THOMAS, BRYANT & MALBURN, AND Mr. G. P. NEVITT, for appellants.

Mr. H. FROST AND Messrs. SCHUYLER & SCHUYLER, for appellees.

Per curiam.

This appeal was taken by appellants, who were respectively the county treasurer of Teller county, and the board of county commissioners of the same county, from a final decree annulling certain tax sales of mining property belonging to appellees, and the certificates of purchase issued thereon, and enjoining the execution of treasurer's deeds for said property. The abstract of the record, together with the briefs of appellants and appellees, were filed, and the cause was ready for final hearing, in the supreme court, at the time the order was made transferring the cause to this court under chapter 107, session laws of 1911. Afterwards, appellees filed their motion to dismiss the appeal, asserting that the judgment was not one which could be taken to the supreme court by appeal. Appellants moved to strike the motion of appellees from the files, for the reasons, as claimed, that this court is without authority to entertain such motion, after full appearance in the supreme court and submission to its jurisdiction by appellees, and that the latter are, for the same reason, estopped to question the jurisdic-

tion on appeal. Counsel for appellants have not contested the claim of their opponents that there was no right of appeal from this judgment to the supreme court under section 388, Mills. Ann. Code (sec. 422 Rev. Code, 1908), and the position of appellees in that regard is affirmed by the court. On the other hand, we cannot assent to the grounds of appellants' motion to strike, without running counter to previous decisions of this court, including the cases of *Western Lumber & Pole Co. v. Golden*, and *Colorado M. & M. Co. v. Rocky Mountain National Bank*, recently decided. In conformity with the rulings in the cases last mentioned, the motion of appellants must be denied, and the motion of appellees to dismiss the appeal will be sustained, provided, and it is further ordered, that the clerk of this court enter the cause as pending on writ of error, in the manner and with the effect, as provided in section 423, code of civil procedure, Rev. Stat. 1908, and that this cause be set down for final hearing, as upon writ of error.

HURLBUT, Judge, concurs in the dismissal of the appeal, but dissents from the order entering the cause as pending on writ of error.

SCOTT, Presiding Judge, having been of counsel, does not participate.

[No. 3473.]

FISHBACK V. VINING ET AL.

1. PRINCIPAL AND AGENT—*Ratification*. If one would repudiate the acts of another who, without authority, has assumed to contract for him, he must repudiate them *in toto*. Ratification of any part of the transaction ratifies it as a whole. One

fatal to the decree of that court. The phrase found in the complaint, "that the amount herein involved and sued for does not equal nor exceed the sum of two thousand dollars," was not a compliance with the statute. No money judgment was demanded. Whatever the amount involved and sued for might have been, it was no indication of the value of the disputed premises. The jurisdictional statement in the complaint, and not the *ad damnum* clause, must be looked to to ascertain the court's jurisdiction.

Appellee contends that while the law may be as above stated, the record shows that the objection to the admission of the county court decree and files was a collateral attack upon the same, and that, inasmuch as the county court has concurrent jurisdiction with the district court within its prescribed limitation, the law will presume the decree to be valid as against such attack. The case of *Bateman v. Reitler*, 19 Colo., 547, was one considered by the supreme court on error to the district court. It was a case which related to a collateral attack upon a judgment of the county court of Jefferson county, which judgment involved real estate. Justice Hayt, speaking for the court, uses this language:

"If the court administering upon the estate had jurisdiction of the subject matter and of the parties, its orders and judgments are not open to attack in this proceeding."

The absence of the above mentioned jurisdictional clause from the county court complaint showed on its face that that court had no jurisdiction of the action. The decree founded thereon could be collaterally attacked. *Trowbridge v. Al-*

len, 48 Colo., 419; *Empire Ranch & Cattle Co. v. Coldren* (Colo.); 117 Pac., 1005.

Appellant in his original brief did not make the slightest allusion to the rulings of the court upon other alleged errors, and particularly to that excluding from evidence the tax deed offered by appellant in support of his case. Appellee, however, discussed at length the rulings of the court in that behalf, to which appellant filed a reply brief, and again ignored the question. We have heretofore held that errors assigned but not discussed in the briefs will not be noticed. Hence we assume that the district court properly excluded the tax deed from evidence when offered.

In view of the conclusions above expressed the trial court did not err in excluding from evidence the decree and files of the county court of Yuma county.

Judgment Affirmed.

[No. 3443.]

MODERN BROTHERHOOD OF AMERICA V. LOCK ET AL.

1. FRATERNAL SOCIETIES—*Benefit Certificate a Policy of Life Insurance.* It is settled law in this state that the benefit certificate of a fraternal order, is, so far as regards the insurance features thereof, a policy of life insurance, and subject to the same statutory regulations and limitations as those of old line and mutual assessment companies, unless expressly excepted therefrom by statute, and that the act of April 11, 1903 (Laws 1903, c. 119) applies thereto.

2. LIFE INSURANCE—*Suicide as a Defense—Statute Construed.* It seems that under sec. 1, and clause 1 of sec. 73, of chapter 193 of the Laws of 1907 (Rev. Stat., secs. 3087, 3160) suicide of the insured would be a defense to an action upon a certificate issued by a fraternal order, since that enactment.

he thought could be adjusted when he returned home. In addition to the \$450 paid plaintiff, or for him, as the net purchase price, the Vinings on the same day paid the defendant McPherson \$550 to be used in settlement with the defendant, Clayton, and of which \$350 were paid to the said defendant, to be applied upon the second mortgage indebtedness, and in consideration of which he gave the purchasers a written agreement to withdraw foreclosure proceedings theretofore commenced, and to extend for one year the time for payment of the agreed balance, \$400, to be evidenced and secured by new note and deed of trust. The remaining \$200 was retained by the defendant, McPherson. Possession of the premises was delivered to the purchasers by plaintiff's wife about March 17th, and they have ever since remained in possession, and made some permanent improvements and changes thereon prior to the beginning of suit or notice of plaintiff's dissatisfaction. Plaintiff's wife, and plaintiff also from the date of his return about May 3rd, boarded with the purchasers until July 3rd. Immediately upon his return plaintiff learned from his wife, and soon thereafter from the purchasers, that they had bought the property upon representations from McPherson that the cost thereof to them would be \$2,600, consisting, as they understood, of \$450 cash to plaintiff, whatever amount of cash was necessary to be paid to Clayton including attorney's fees and costs of foreclosure, and the unpaid balance of the incumbrances to be assumed, which total amount the purchasers had agreed with McPherson to pay or assume. A few weeks afterward plaintiff notified said purchasers that the bond had been executed

without his authority, and that McPherson had no authority to bind him; that McPherson had retained \$200 in excess of the amount required to satisfy the incumbrances, and demanded that they compel McPherson to repay that amount, but, at the same time, told the purchasers he would protect them in the sale. About June 3rd he demanded payment of the sum of \$200 from the purchasers themselves, and in July, when he vacated the premises as boarder, demanded payment of a larger sum, and thereafter began his suit to recover from the purchasers \$276.85, alleged to be the balance of the unpaid purchase price upon the oral contract as made between the Vinings and McPherson, his action being in the nature of a suit for specific performance, the deed and stock being tendered. Judgment was also asked against McPherson in the sum of \$200 alleged to have been secured and retained by deceit and fraud, such amount to be applied for the use and benefit of plaintiff or the purchasers, and prayed judgment against the defendant, Clayton, requiring endorsements to be made upon the incumbrance. The Vinings pleaded purchase in good faith, payment in accordance with the contract, and estoppel by ratification, tendered payment of certain sums as hereinafter mentioned, and asked for specific performance of the agreement as set forth in the bond. The cause was tried to the court without the intervention of a jury. The court made findings of fact that plaintiff had authorized defendant, McPherson, to find a purchaser for the property at \$450 net to plaintiff; that the bond executed and delivered was without authority, but that the sale and the bond had been ratified by plaintiff, and rendered

judgment in favor of the defendants, requiring delivery of deed and stock, upon payment by the purchasers of a sum of money which they had offered to pay by reason of certain payments having been made by plaintiff to the building and loan association, and to Clayton, of which the purchasers had no knowledge at the time of the contract, and required the defendant, Clayton, to make certain endorsements and perform certain acts, which he also offered to make and perform.

The evidence in regard to the authority of the defendant, McPherson, to offer the property for sale is not wholly convincing, but is supported by some positive testimony and corroborating circumstances, and, so far as is necessary to be considered, the findings of the trial court in that respect will be regarded as binding upon this court. The bond was executed without authority. Defendant, McPherson, had no authority, express or implied, as shown by the evidence, to receive money for and on behalf of the plaintiff, and plaintiff, upon his return and learning of the facts, was at liberty to repudiate not only the written agreement, but all unauthorized acts of McPherson; and, upon return or tender of the amount of money which had been paid on the contract and applied to his use, could have ejected the purchasers from the premises, unless they could have successfully defended their right of possession under the parol contract with McPherson, which is not necessary to decide. Plaintiff did not repudiate the sale. He undertook to protect his wife and Mr. Haynes who were bound in the sum of \$900 to secure execution and delivery of the deed and assignment of the building and loan stock. He retained

and still claims the benefit of the money paid by the purchasers, and brought his suit to enforce specific performance, not of the written agreement, but of the oral one, ratification of which he admits. Plaintiff utterly denies and repudiates the authority of the defendant, McPherson, to act for him in any of the negotiations leading up to or connected with the transaction.

It is settled law that ratification in part of the unauthorized acts of one not an agent but assuming to act as such, is a ratification of such acts *in toto*. If plaintiff ratifies part he must ratify all, or if he repudiates part he must repudiate all.—*Burkhard v. Mitchell*, 16 Colo., 376, 380. *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App., 249. *Gaines v. Miller*, 111 U. S., 395, 398. Clark & Skyles, Law of Agency, sections 108 and 140, and cases cited. Whether the ratification by plaintiff was of the bond or the oral agreement, is immaterial. He ratified the sale; and by so doing, so far as the purchasers are concerned, he likewise and to the same extent ratified the unauthorized acts of the defendant, McPherson, in accepting payment, which was a part of the same transaction. There was nothing disclosed by the evidence which shows or tends to show misrepresentation or bad faith upon the part of the purchasers or the defendant, Clayton. It is impossible to justify some of the statements made by the defendant, McPherson, as testified to by plaintiff's wife, Mr. Haynes and the Vinings, which, so far as made to Mrs. Fishback and to Mr. Haynes, had a tendency to deceive them as to the amount the purchasers were willing to pay; and as made to the purchasers, to deceive them as to the amount necessary

to be paid to cover the incumbrances, costs of foreclosure, etc. But the purchasers are not complaining, and the representations to them did not, in a legal sense, concern the plaintiff in this case. The alleged deceit may be cognizable in *foro conscientiae*, but, although McPherson was not wholly an interloper, according to plaintiff's own testimony and pleadings he sustained no fiduciary relation to plaintiff, and, therefore, his failure to fully or truthfully state the conditions to those assuming, but not authorized, to act for plaintiff, cannot avail the plaintiff in this proceeding. The judgment of the trial court is affirmed.

[No. 3506.]

CASSERLEIGH ET AL. V. SPAR CONSOLIDATED MINING CO.

APPEALS—*Freehold Involved—Remanding Cause.* An action seeking to enjoin a cloud upon the title to lands does not involve the freehold. No appeal lies from a decree in such cause.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. M. B. CARPENTER, Mr. F. T. JOHNSON, for appellants.

MESSRS. THOMAS, BRYANT, NYE & MALBURN, for appellee.

CUNNINGHAM, Judge.

Appellee, as plaintiff below, brought this action in the district court to remove the cloud from its title to certain mining property, occasioned by the attempted lien asserted by appellant Casserleigh.

It appears from the complaint that Casserleigh was attempting to subject the property involved to an execution issued on a judgment in his favor and against certain individuals. This action was brought by the mining corporation to enjoin and restrain the sheriff from selling the property under said execution, and to quiet the title of the same in the mining company as against Casserleigh's claim under the aforesaid execution. The plaintiff company, appellee here, prevailed in the court below, and this case is in this court on appeal from such judgment.

Counsel for appellants have filed a motion to remand the case to the supreme court, on the ground that, as they assert, a freehold is involved. Under the ruling in *Callbreath v. Hug*, 48 Colo., 202, the motion to remand must be denied.

Having determined that a freehold is not involved, and there appearing no other grounds, under the code, warranting the appeal, the appeal will also be dismissed, and under the authority in the case of *Western Pole and Lumber Company v. City of Golden*, No. 3386, recently determined by this court, the case will be re-entered as pending on error, and the clerk is hereby instructed to enter the necessary orders in the premises.

Motion to remand denied; appeal dismissed; case re-entered as pending on error.

HURLBUT, Judge, dissents from so much of the opinion as pertains to the right of the court to re-enter the case as pending on error.

[No. 3520.]

JOHN THOMPSON GROCERY CO. v. PHILLIPS.

1. *NEGLIGENCE—Definition—Evidence.* Negligence is the failure to exercise such care, prudence and foresight as duty requires under the circumstances.

To establish negligence the facts from which negligence may be inferred must be proved.

2. *MERCHANT—Duty to Customers as to Safety of Place.* A merchant owes to those who come to trade at his place of business reasonable care that the place shall be safe. He is not an insurer of the safety of his patrons.

Plaintiff had for years been a customer at defendant's market. At an early hour in the morning she came into the defendant's store, and approaching the clerk with whom she wished to deal, she suddenly slipped and fell, receiving a serious and permanent injury. While resting after the fall she discovered upon her shoe, between the ball of the foot and the instep, a piece of fatty substance like tallow. No other person saw this substance. The lady threw it from her and omitted to call the attention of any other person to it. She experienced no sense of slipping upon any such substance before the injury. The store was well lighted. Plaintiff's eyesight was good, she was looking where she walked and saw nothing of this fatty substance. It was the custom at defendant's place of business to scrub the floors once every week, and sweep them four or five times every day, and always in the morning between the time of opening and 7:30 of the clock. The floor had been swept on the morning of the accident. Employees of defendant examined the place immediately after the accident and could find no grease or evidence that there had been grease at that place. Nothing of the sort was kept near it. There was no direct evidence that if any such substance was in fact upon the floor, defendant was negligent in permitting it to be there, or in not finding and removing it. *Held*, that inasmuch as if, upon the question of defendant's negligence in this respect the jury were permitted to indulge in speculation and conjecture, it was as reasonable to conclude that the fatty substance found upon plaintiff's foot had gotten there in the street, or in some other place, as in defendant's establishment, the plaintiff's case was not proven, and it was error to submit it to the jury.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MESSRS. BICKSLER, BENNETT, DANA & BLOUNT,
for appellant.

MESSRS. REDD, STIDGER & BENSON, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

This is an action to recover damages for injuries to the appellee alleged to have been occasioned through the negligence of the John Thompson Grocery Company, which at the time conducted a retail grocery and market in the city of Denver.

The plaintiff below obtained a verdict and judgment against the appellant in the sum of one thousand dollars and from which this appeal is taken.

The complaint charged in substance that the defendant so negligently operated and conducted its market as to cause to be thrown and left upon the floor certain kinds of animal grease or meat substance, the same being tallow or some other greasy substance, leaving the same lie upon the floor at its place of business, where customers were accustomed to walk about while doing their trading.

That on the 27th day of November, 1907, and while trading at defendant's store, and without fault upon her part, and without knowledge that the said greasy substance was upon the floor, the plaintiff walked and stepped upon the same, slipped on said substance and fell and thereby received the injuries complained of, and which she alleged to be serious and permanent.

The defendant answered, specifically and gen-

erally denying the acts of negligence charged, and pleaded contributory negligence.

Aside from the physicians, whose testimony was confined to the character of the injuries and the treatment thereof, the only witness for the plaintiff was herself.

From this it appears that at the time of the accident, the plaintiff was a woman forty-six years of age, and earned her living in the principal occupation of a laundress; that she was well and strong and had a good earning capacity; that she had been a patron of the store for seven or eight years; that she entered the store of defendant on the morning of the 27th day of November, 1907, between seven and eight o'clock for the purpose of purchasing a turkey for Thanksgiving. That entering the front of the store she walked down the aisle between the counters where meat products were kept, and approached a clerk standing where turkeys were exposed for sale. That she stopped and was about to make inquiry of the clerk having in charge what she wanted to purchase, when she slipped and fell. That both her feet slipped from under her; that she was then assisted to her feet and walked toward the rear of the store where a box was provided and upon which she sat down and where she remained for from twenty to thirty minutes when she walked over to the city hall and was attended by the city surgeon.

While sitting on the box, the plaintiff says she found and removed from her foot a piece of fatty substance about as wide as her two fingers, and about an inch and a half long. She does not know exactly what this substance was, but that it was

greasy, looked like tallow and might have been tallow; that she found it on her foot between the ball of the foot and the instep and that she threw it up against the wall and under the telephone.

The plaintiff further says that she did not call the attention of any person to the existence of the fatty substance and does not know that it was seen by any one aside from herself. She was assisted in one way and another until she left the store by three different employees, one of them binding a piece of meat on the injured arm. The plaintiff says that the store room was well lighted, that her eyesight was good and that she was looking where she walked and did not see the substance on the floor, which she afterward found on her shoe.

Three physicians testify that the injury was a colles fracture of the arm. The injury was not healed at the time of the trial in May, 1909, and in the opinion of each of the physicians, it was permanent. An operation was had in April after the injury, so that if there is liability upon the part of the defendant the verdict rendered by the jury would appear to be in no sense excessive.

At the close of plaintiff's testimony the defendant moved for a non-suit which was denied by the court.

Again, the defendant at the close of the trial moved the court for a directed verdict upon grounds substantially as offered in the motion for a non-suit as follows:

"First. The evidence on the trial fails to show in any manner any negligence on the part of the defendant contributing to the injury received by the plaintiff.

Second. There is no evidence whatever that the defendant caused to be thrown upon the floor of its meat market, and left upon such floor, any tallow, animal substance or other greasy substance as charged in the complaint.

Third. The evidence fails to show any failure on the part of the defendant to exercise ordinary and reasonable care under the circumstances as required by law.

Fourth. The evidence affirmatively shows that the defendant did exercise ordinary and reasonable care to keep its floors in a suitable condition.

Fifth. There is no evidence whatever from which any presumption of negligence on the part of the defendant could be inferred.

Sixth. The evidence shows that the plaintiff was negligent herself and by the exercise of ordinary care could have seen the tallow which she claims was upon the floor, if it had been there.

Seventh. The evidence fails to show that plaintiff's present condition and injuries are a direct, proximate and immediate result of defendant's negligence.

Eighth. Even if it should appear from the evidence that there was grease upon the floor which caused plaintiff's fall, the evidence fails to show that the defendant did not exercise reasonable and ordinary care to keep the floor in good condition, and the mere fact that the grease was present, if it was, is not of itself a fact of negligence, sufficient to charge the defendant in this action."

This motion was likewise overruled and the ruling of the court upon these motions, together

with certain instructions, tendered by defendant and refused by the court, are assigned as error.

Of the rulings of the court upon the two motions it will be necessary to consider only that denying the motion of defendant for a directed verdict, for in proceeding with the introduction of its testimony after the denial of its motion for a non-suit, the defendant assumed the risk of any evidence beneficial to the plaintiff from its own witnesses.

The defendant offered the testimony of three witnesses, two in its employ, both at the time of the trial and at the time of the accident, and one in the employ of the defendant at the time of the accident, but not at the time of the trial.

These all agree upon certain points as follows: That the defendant caused its floors to be scrubbed once a week; that it caused its floors to be swept from four to five times each day, and always once in the morning, between the time of opening and seven thirty o'clock; that they assisted the plaintiff at the time of the accident; that the floor was swept that morning and before the accident; that they saw no such or any grease or fatty substance, or any such substance on the floor, or on plaintiff's foot; that plaintiff did not suggest that she had found any such substance; that immediately after the accident, each examined the floor where plaintiff fell and could find no grease or evidence that there had been such on the floor, or any indication that such had been mashed as if by crushing with the foot; that no such fatty or greasy substance as described by plaintiff was kept on either of the counters, between which plaintiff fell.

The witness Albin says that the plaintiff came

into the store between seven and eight o'clock in the morning, that she came toward him, he was looking at her all the time, expecting to take her order; that she was walking as if in a hurry, and when opposite his block, she turned suddenly as if she was going into the grocery department and fell; that when he was assisting her to arise she said: "I guess I was in too big a hurry."

The witness Kroeger testifies that he was not at the time of the trial in the employ of defendant, but at the time of the accident was assistant manager of defendant's meat department; that at the time he had just finished sweeping the floor and had placed the broom away, intending to clean the block, and had just reached the block about eight feet from plaintiff when she fell.

Then taking the testimony in its most favorable light for the plaintiff we find that she had been for some years a patron of the store, in good health with good eyesight, in a well lighted room, walked down an aisle in the meat department of the store that had just been swept, paused at a counter near a clerk to whom she was about to give an order, slipped and fell, sustaining the injuries complained of, and after being seated, found a piece of fatty substance on her shoe between the ball of the foot and the instep. There is at least no stronger evidence as to defendant's negligence, and there was no testimony offered tending to contradict the evidence of the defendant as to the custom and efforts to keep its store clean and free from refuse or debris upon the floors. Neither is there any testimony tending to show, that defendant could by the exercise of diligence have discovered the existence of the particu-

lar substance in the question upon its floor, if it in fact was there, which at best can only be inferred from plaintiff's testimony, to the effect that she found such upon her shoe after the accident.

Mr. Thompson in his work on negligence suggests as perhaps the best definition of negligence, of the many quoted and discussed, the following: "Failure to observe for the protection of safety of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand," and says further that "The same conception, possibly better expressed, is found in the definition 'that negligence is the failure to exercise such care, prudence, and forethought as duty requires to be given or exercised under the circumstances.' "

The author further declares: "An essential ingredient in any conception of negligence is that it involves the violation of a legal duty, which one person owes another—the duty to take care, for the safety of the person or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Therefore, it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant, must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." 1 Thompson on Negligence, 4 and 5.

No rule can be laid down that will fairly apply to all classes of cases relating to actionable negligence and we must therefore look for guidance to those adjudicated cases which involve similar circumstances as in the case at bar, and in this case,

the duty of storekeepers for the just protection of their patrons, or those lawfully on or within their premises.

In the very comprehensive brief of appellee we find a very full discussion of this subject with numerous authorities cited.

In *Larkin v. O'Niell*, 119 N. Y., 221, cited by appellee, the rule was stated as follows:

"The defendant was a dry goods dealer, transacting a very extensive business. A large number of people frequented his store every day. The business that he was conducting was, from its very nature, an invitation to the public to enter upon his premises. He was bound to use reasonable prudence and care in keeping his place in such a condition that people who went there by his invitation were not unnecessarily or unreasonably exposed to danger. The measure of his duty was reasonable prudence and care." And for this cited *Beck v. Carter*, 68 N. Y., 283, and *Bennett v. R. R. Co.*, 102 U. S., 577.

The court in speaking of the facts in that case further says:

"There is no proof in the case from which it could be found that the defendant neglected any duty that he owed to the plaintiff. She was not exposed to any unreasonable or concealed danger. She fell while walking down a broad, carpeted stairway, between four and five o'clock in the afternoon. There was nothing in the manner in which the stairs were constructed, used or kept from which such a result could reasonably be anticipated. It is quite probable that the accident occurred from slipping, or from a mis-step by the plaintiff. But whatever

caused the injury it is quite clear that it could not be attributed to any want of care on the part of the defendant. The language of the court in *Crafter v. Metropolitan Railway Co.* (L. R. [1 C. P.] 300), applies: "The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence, such as ought reasonably and properly to be left to a jury."

There is no testimony in the case at bar that can in any sense be said to show want of "reasonable prudence and care," or that the plaintiff was "unnecessarily or unreasonably exposed to danger."

At best the testimony in this can show only by inference that the greasy substance was on the floor.

Then the only fact that the jury could find in this connection was that the plaintiff found the substance on her shoe after the accident and while sitting down. May the jury infer that because of this fact, the defendant negligently permitted this substance to be on the floor and that plaintiff stepped on it and by reason thereof fell and so sustained the injury.

If the jury are permitted to so speculate, may they not have concluded with equal degree of certainty, that because the plaintiff was looking where she was walking, and did not see the substance on the floor; that the fatty matter having been found neither on the heel or ball of the foot where the weight of the body would necessarily rest; that because she did not experience any sense of stepping on such substance; that because the floor had been swept immediately previous to the accident; that because an examination made immediately after, dis-

closed no grease spot or other evidence of the mashing of the substance on the floor, and without which it could not have caused the fall; that because no such pieces of fat were kept on the defendant's counters near that point; and that all the meats were cut on blocks behind the counters, that therefore and because of these facts the substance became attached to her foot in some other place and at a different time?

Facts constituting negligence must be proven. In this case the only alleged fact from which negligence might be even inferred is in itself doubtful. Appellee cites the case of *Market Co. v. Claggett*, 19 App. Cases, 12, where the plaintiff upon entering the market, without being able to see clearly what was in her path stepped upon some fish and ice that had been spilled on the floor, and sustained the injury in question. But the doctrine declared in that case is not materially different from that before stated. There the court said:

"It was the duty of the Market Company to guard against danger to their patrons, and if, by reason of the unsafe condition of the premises, an injury to a patron be sustained, without fault on his part, the onus is upon the market company to show that it could not, by the exercise of reasonable care by those for whose acts and omissions it was liable, have prevented the accident. Judge Cooley in his work on Torts, pp. 604-607, says, that when one 'expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them to danger, and to that end he must exercise ordinary care and prudence to

render the premises reasonably safe for the visit.' And in the leading English case of *Indermaur v. Dames*, L. R. 1. C. P., 274, and 2 *Id.*, 511, where the question was fully considered as to the rights of persons who, upon invitation, either express or implied, visit premises upon business which concerns the owner or occupier, the court said 'that it was settled law that a visitor of that class, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know.'

In that case there was no question but that the fish and ice were on the floor where it ought not to have been, nor was there any question but that the plaintiff slipped by stepping on the fish and ice, and so caused the fall and the injury. Beside, a witness employed by the party owning the particular stall in the market, testified that he had seen the fish and ice on the floor in the aisle a short time before the plaintiff came in, but he was engaged, and did not stop to take them up but did so after the accident, so that the danger being shown the question of knowledge or opportunity to know of it upon the part of defendant was clearly a question for the jury.

But assuming that the grease was on the floor and was the cause of plaintiff's fall, before plaintiff can recover, there must be some evidence at least, tending to show that defendant or its agents knew, or by the exercise of reasonable diligence could have known this fact, before it may be held guilty of negligence.

In *Reeves v. 14th Street Store*, the plaintiff fell on defendant's stair, claiming she slipped on what

“looked as though some one had spit up a lot of phlegm and it had laid there the way it was for two or three days, for it was dried around the edges, and that is what I took it I fell on.” Mr. Justice Gaynor said:

“The verdict was not justified either on the law or the facts. There was no evidence that the defendant knew of the mess on the stairway described by the plaintiff and her husband, nor from which it could be found that it was there so long that in ordinary care the defendant should have known of it and removed it. It could not remain there long with people constantly walking over it, to say nothing of the store being swept and cleaned daily.”

We hold it to be the rule that in the case of a merchant, where the public are invited on his premises, to inspect and purchase his goods, he is held to a greater degree of care and diligence than otherwise, yet he cannot be held to be an insurer of the safety of his patrons.

In this case we are unable to find any evidence of negligence at all, and in addition to what has been said in that regard, the defendant's assistant foreman of the market, testified that it was his duty, and to which he attended, to walk about the floor and to pick up matches, cigar stubs and other debris that he might find.

It was therefore the duty of the court in the absence of any evidence as to negligence upon the part of the defendant to have directed a verdict in its favor.

In this the case of working woman, dependent upon her labor for support, and with a probably permanent injury, is presented one which strongly

appeals to both a court and jury, but to determine otherwise, than we do, would be to hold that the mere fact of the accident is sufficient in itself to charge the defendant with the fault, for there does not appear from the evidence a failure upon its part to perform any duty which the law enjoins.

The judgment is reversed and the case remanded.

All the judges concurring.

[No. 3525.]

KENT v. TREWORGY.

1. NEGLIGENCE—Automobile—Duty of Driver Towards Others on Street. One driving an automobile upon the public street is bound only to reasonable care to avoid injury to others. Seeing a boy approaching upon a bicycle, it is not incumbent upon him to do anything until it is apparent that a contact is inevitable, or at least highly probable; and even then his failure to stop or check his speed is not negligence *per se*, but only evidence from which the jury may infer negligence, or refuse to draw that inference, according to all the circumstances.

2. — *Instructions.* In an action for an injury attributed to the negligence of defendant in the management of an auto car upon the public street, an instruction to the effect that if before the accident, the defendant saw plaintiff approaching upon his bicycle, and there was sufficient time and sufficient space between them, "to have permitted of defendant lessening his speed sufficiently to have avoided the accident," it was negligence on the part of defendant not to do so, is error, as importing that if the defendant failed to exercise the highest degree of care possible he was negligent as a matter of law.

So an instruction that if defendant "had sufficient time after first seeing plaintiff approach upon his bicycle to have stopped the same or brought it to such slow speed as to avoid the accident," but he "maintained the same speed until after the accident," they might find that defendant was negligent and that such negligence caused the plaintiff's injury.

3. INSTRUCTIONS—*Detailing Facts*, must include all the facts material to the rights of all parties.

In an action by a boy for an injury attributed to defendant's negligence in driving an auto car upon the public streets, defendant testified that he didn't see the boy until he rode out from behind a wagon, directly in front of his machine; and the evidence left the question of defendant's conduct and whether he omitted anything which he could have done to avoid the injury, in sharp dispute. Held an instruction which left it to the jury to find the defendant guilty of negligence if he could have stopped or checked his speed when he first saw the plaintiff, whether plaintiff was then in any peril or not, was error; that until the peril of the boy was apparent defendant had the right to assume that the boy would turn to his right or the west side of the street, as defendant was turning to the east, or if, by reason of the plaintiff's immaturity, defendant had no right to indulge this presumption, it was for the jury to say whether, under all the circumstances, defendant should be held to a knowledge of the immature years of the plaintiff, and when, if at all, it became defendant's duty to make reasonable effort to check or stop his machine.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. CHARLES R. BOSWORTH, for appellant.

MESSRS. ORAHOD & ORAHOD, for appellee.

CUNNINGHAM, Judge.

The plaintiff, a lad eight years of age, was, at the time of the injury complained of, riding on the handle bars of a bicycle propelled by a boy eleven years of age. While thus riding, he came in collision with an automobile which was being driven by the defendant. Complaint is made by appellant of instructions five and six. These instructions read as follows:

Instruction No. 5. "The court instructs the jury that in this case the defendant was bound to exercise ordinary care and prudence in the driving

and management of his automobile in attempting to pass plaintiff in the public highway at the point where the accident occurred, and if you believe from the evidence in this case that just before the accident occurred defendant saw the plaintiff approaching on a bicycle, and there was sufficient time before the accident, and sufficient space intervening between plaintiff and himself to have permitted of defendant applying the brakes on the automobile and lessening its speed sufficient to avoid the accident, then it was negligence on the part of the defendant if he did not do so."

Instruction No. 6. "The court instructs the jury that if you believe from the evidence in this case that the injury to plaintiff set forth in the complaint in this action was caused by defendant, and that prior to such injury defendant had sufficient time, after first seeing plaintiff approach on his bicycle, to have applied the brakes to his automobile and have stopped the same or brought it to such a slow speed as to avoid the accident, but instead of doing so made no effort to slow down the automobile, but on the contrary maintained the same speed when he first saw the plaintiff until after the injury occurred, then you may find that defendant was negligent in not so doing and that such negligence caused the injury complained of to the plaintiff."

It will be seen by an examination of each of these instructions that the court advised the jury that if the evidence disclosed that before the accident defendant saw the plaintiff approaching on a bicycle, and there was sufficient time before the accident, and sufficient space intervening between plaintiff and defendant to have permitted of defendant's

applying the brakes on the automobile and thus have avoided the accident, then it was negligence on the part of the defendant if he did not so apply the brakes and stop the machine. In other words, the defendant, by this instruction, is held to the exercise of the highest possible degree of care, and if he did not exercise the highest degree of care possible, then he is made liable as a matter of law. The defendant was only liable if he failed to use reasonable care to prevent the accident, and what is reasonable care is always, under circumstances like those involved in this case, a matter for the determination of the jury.

Again: these instructions, as we view them, are fatally defective from yet another point of view. They advise the jury, in effect, that if the defendant could have stopped or checked his machine *at any time after first seeing the approach of the plaintiff on his bicycle*, then he was guilty of negligence *per se* if he, the defendant, failed to stop the machine. If defendant's testimony be accepted, he did not and could not see the boys on the wheel in time to have stopped his machine, and he did everything possible to prevent the accident after the boys, as he said, rode out from behind the wagon immediately in front of his machine. Therefore, under all the circumstances, the instructions would be prejudicial, since they applied to a situation not supported by the evidence. If the testimony offered by plaintiff, especially that of the driver of the sand wagon, be accepted, then the defendant did see, or could readily have seen, the boys approaching on their wheel for some time before the accident, and before they were in any peril whatever. These instructions,

especially No. 6, advise the jury that it was the duty of the defendant to stop as soon as he had seen the boys approaching on the wheel, wholly regardless of whether they were or were not, at the time he first saw them, in a perilous position. In *Barker v. Savage*, 45 N. Y., 191; 6 Am. Rep., 66, it is said:

“It does not appear that after such contact was inevitable the defendant, in the exercise of due care, could have done anything then omitted by him, to prevent the contact.”

The statement of the evidence most favorable to the plaintiff, and justified by the record, is that whether defendant could have done anything which he omitted to do to prevent the contact after the same was inevitable, is a matter in sharp dispute. Therefore, the instructions on this point ought to have been so framed as to have fairly submitted this disputed question of fact to the jury. It was not incumbent on defendant to do anything until after it was apparent that a contact was inevitable, or at least highly probable. It was not his duty to stop when he first saw the boys on the wheel, unless at that time it was apparent that they were in a position of peril, and then defendant's failure to stop or check his machine was not *per se* negligence. He would have the right to assume, until their perilous position became manifest to him, that the wheel they were riding would be turned to their right or the west side of the street, as he was turning to his right or the east side of the street; or, if because of the immature age of the boys, the defendant would have no right to indulge in such presumption, then it was for the jury to determine whether, under all the circumstances, the defendant should be held to

a knowledge of the immature age of the boys and their lack of responsibility, and it was for the jury to say, under instructions properly framed, when, if at all, it became the duty of the defendant to make reasonable effort to stop or check his machine. In other words:

“When a court instructs a jury upon what state of facts a verdict must be rendered against the parties, the instruction must include all the facts material to the rights of all such parties.”

Reynolds v. Hart, 42 Colo., 155, and cases there cited. We think the two instructions in this case wholly fail to square with this rule, and the case, for that reason, must be reversed.

There are other alleged errors discussed in the brief, and on oral argument, which we have not deemed it necessary to pass upon, and as to them, we express no opinion, believing that on a second trial these doubtful questions will be eliminated.

Reversed and Remanded.

HURLBUT, Judge, having been of counsel for the plaintiff in the case below, did not participate in the opinion.

[No. 3396.]

MUNTZING ET AL. V. NEWSOM.

1. EVIDENCE—*Judicial Notice*. The courts take judicial notice of the county in which particular lands are situate; and of the county seat of such county.

2. TRUST DEED—*Construed—Certainty as to Successor Trustee*. A deed of trust conveyed lands situate in a particular county was acknowledged in that county; the note secured thereby was made payable at the county seat of the same county; and the deed provided that any sale of the lands thereunder, should be

made at the court house in that county. Held that the designation of the "county clerk," as successor in trust, not specifying what county clerk, imported the county clerk of the same county and was sufficiently certain.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. EGBERT MORE, for appellant.

MR. JOHN F. MAIL, for appellee.

CUNNINGHAM, Judge.

Plaintiff, appellee here, brought her action in ejectment in the district court to recover possession of the southeast quarter ($\frac{1}{4}$) of section fourteen (14) township two (2) north, range fifty-two (52) west, Washington county. The only question debated in the briefs pertains to the sufficiency of a certain trustee's deed offered in evidence by the plaintiff, and admitted for the purpose of establishing her title in the land, and we shall accordingly limit our consideration of the case to this point.

The trustee's deed complained of was executed by G. M. Boss, county clerk of Washington county, Colorado, as successor in trust. The only provision in the trust deed for a successor in trust is found in a parenthetical clause in that instrument, reading as follows: "And in case of refusal or inability to act of said second party, then county clerk is made successor in trust to said second party under this deed for the uses and purposes herein expressed with the same power as said trustee." Appellants on the trial, and in this court, base their objection to the trust deed upon the contention that it does not appear in the trust deed what county clerk, or the clerk of what county, was designated as successor

in trust. In other words, they assert that the uncertainty of the party designated in the trust deed as successor in trust is so manifest that no one was authorized as successor in trust to execute the power of sale contained in the trust deed, and, therefore, the trustee's deed executed by Boss, the county clerk of Washington county, and on which the appellee relies for her title, was and is void. A very similar question was before the supreme court of this state in *Kilgore v. Cranmer et al.*, 35 Colo., 485. In the *Kilgore* case, as here, the regularity of the trustee's deed was the sole question before the court. In that case it appears from the opinion that both parties to the trust deed were residents of the county in which the land was situated, and where, by the provisions of the trust deed, the sale should take place, in the event of a foreclosure. In the deed before us, the residence of the parties to the trust deed is not made to appear. In that respect, the trust deed here under consideration, and the trust deed before the court in the *Kilgore* case, are dissimilar. But it appears from the trust deed before us: (a) that the notes secured by it were payable at Akron, Colorado (and we may take judicial notice that Akron is the county seat of Washington county); (b) that the land was situated in Washington county; (c) that in case of default in the payment of the notes, the land was to be sold at public auction at the front door of the court house in the county of Washington; (d) that the advertisement of the sale was to be made in a newspaper published in said county; (e) that the acknowledgment of the trust deed was made before a notary public in and for said county.

There is no occasion for us to prolong this

opinion by citing and quoting the authorities bearing on the question that we are considering, since they will be found fully collated by Mr. Justice Maxwell, who wrote the opinion in the Kilgore case. In the absence of any showing whatever that the county clerk of Washington county was not the party intended by the contracting parties, we hold that he was the party designated in the trust deed as the successor in trust, and that the trial court properly overruled the objection of appellant to the admission of the trustee's deed executed by that official.

The judgment of the trial court is affirmed.

[No. 3408.]

BULLOCK V. LEWIS.

1. *CONTRACTS—Construction—For the Court.* It seems that the interpretation of a contract is for the court, even though the contract be entirely by parol.

2. — *Construed.* Plaintiff, through the defendant, a stock broker, purchased stock in a mining corporation. The purchase was made upon the broker's recommendation, and upon his promise, as alleged, that he "would see her out with her money and good interest." Held that the contract was one of indemnity; that the broker's liability depended upon the purchaser's sustaining loss by depreciation of the stock, or by its failure to so advance that she would receive the equivalent of interest upon her investment; that in order to a recovery plaintiff must show a loss; and that her recovery would be measured by the difference between the amount paid for the stock and its highest value within a reasonable time after the purchase, less by any dividends received; that plaintiff was entitled to a reasonable time after the purchase, within which to determine whether she would then sell or wait for an advance; and that the failure of the plaintiff to avail herself of opportunities to realize upon the investment within a reasonable time, might be a complete defense to her action.

3. — *Reasonable time*, depends upon the nature of the subject matter of the transaction, e. g. in the case of a transaction in mining stocks, the fluctuating and uncertain value of such investments is to be considered.

The question is for the jury under appropriate instructions.

4. EVIDENCE—*Admissibility*. Where it is sought to charge a broker upon his contract to indemnify a customer against loss in the purchase of mining stocks, upon his recommendation, he is entitled to show the market value of the stock, within a reasonable time after the purchase.

Appeal from Denver District Court. HON. HARRY C. RIDDLE, Judge.

Mr. EDWARD D. UPHAM, Mr. J. E. ROBINSON, for appellant.

Mr. HENRY HOWARD, JR., for appellee.

KING, J., delivered the opinion of the court.

This is an action brought by appellee to recover from appellant the principal sum of \$1,170, together with interest thereon at eight per cent. per annum, the principal sum named being an amount of money paid by plaintiff to defendant to be by him invested for plaintiff in the purchase of certain specified stocks in a mining company, and which was by him so invested.

The complaint contained two causes of action, the first in tort, and the second in contract. By the first it was in substance alleged: That defendant, about November 12th, 1900, represented himself to be the president of The Butterfly-Terrible Gold Mining Company, a corporation, and that said company owned valuable mines known as The Silver Bell Group in San Miguel county, Colorado, upon which a great amount of development work had been done; that wrongfully and with intent to procure money

from the plaintiff, defendant stated that rich deposits of ore had been discovered, and that there was "ore in sight" sufficient to pay dividends for a number of years; that plaintiff, relying upon said representations, purchased shares of stock in said company as follows: November 12th, 1900, 5,000 shares for \$1,000; March 12th, 1901, 1,000 shares for \$385; August 10th, 1901, 1,000 shares for \$385; that defendant represented that said investment was perfectly safe, and advised plaintiff to place all the money she had therein; that in fact there was only a small body of ore in said mines, which was of little or no value, and that dividends were not paid except for a part of the year 1901; that the stock was worthless; that February 27th, 1907, plaintiff made demand of defendant for the sum of \$1,770 with interest thereon, as damages.

For a second cause of action plaintiff made substantially the same allegations as in the first, with the exception of an additional paragraph, as follows:

(The original was not in italics.)

"That as inducement for plaintiff to purchase said mining stock in the Butterfly-Terrible mine, and *as a contract* between the plaintiff and defendant, the defendant contracted with the plaintiff, on or about the 12th day of November, A. D. 1900, that if she would buy said stock (which she alleges she did) *he would see her out in her purchases, and see that she received her money with good interest thereon, and that she should not lose anything by her said investment;*" and, after alleging the investment of this money in the stock, and that the stock purchased as aforesaid was of no value what-

ever, alleged "That the plaintiff frequently called upon the defendant therefor, and he repeatedly assured and promised her that she should have her money and interest thereon, the last of said promises being on or about the 1st day of October, A. D. 1903, and requested her to wait therefor; and relying upon said request and promises, the plaintiff extended the time for the defendant to pay said money and took no steps to enforce the collection thereof until the 27th day of February, A. D. 1907 (more than six years after the purchase), at which time the plaintiff made demand upon the defendant." She demanded judgment for the sum of \$1,770 and interest thereon from and after August 10th, 1901, at eight per cent. per annum, and that defendant be found guilty of fraud, and be committed to the county jail of the City and County of Denver until the judgment was paid, together with costs.

Demurrer to the first cause of action was sustained, whereupon plaintiff asked and obtained leave to dismiss said cause of action without prejudice, and the case was tried solely upon the second cause of action.

Defendant, for first defense, admitted the corporate capacity of The Butterfly-Terrible Gold Mining Company; that on or about November 12th, 1900, said company was operating valuable mining property in San Miguel county, Colorado, upon which there were tunnels, shafts, drifts and cross-cuts, and deposits of ore bearing gold and silver, and that he so represented to plaintiff; that plaintiff made demand on him for the sum of \$1,770, on or about February 27th, 1907, no part of which had

been paid by him to plaintiff; denied all other allegations of said cause of action. For second and third defenses, defendant pleaded the statute of limitations. For a fourth defense, denied that he had made the pretended contract, assurances, promises and requests alleged in plaintiff's second cause of action, or any of them, and alleged that at the time mentioned he was a stock broker, engaged in buying and selling mining stocks for his customers, and that in the course of said business as broker, he sold for a customer to said plaintiff, on or about November 12th, 1900, 5,000 shares of the stock of said mining company, at twenty cents per share, and bought for her on her order, about March 7th, 1901, 1,000 shares at thirty-eight cents per share, for which purchase she paid him a commission of \$5, and on August 9th, 1901, 1,000 shares at thirty-eight cents per share, for which she paid him a commission of \$5. and that these were the same transactions mentioned in the complaint; that during the entire time from November 12th, 1900, until November 1st, 1901, stock in said mining company was marketable; that the market price thereof at no time, as bought and sold, fell below the price of twenty-one cents per share, and that the price and value of said stock from January 1st, 1901, to October 31st, 1901, ranged from twenty-six and one-half cents, the lowest, to forty-eight cents, the highest, per share; that all of said facts were well known to the plaintiff; that plaintiff did not at any time authorize defendant to sell or dispose of said stock, or any part of it; that during said time plaintiff might and could have sold her stock at such price as to enable her to receive her entire investment

with good interest, and without loss, but that she failed, neglected and refused to sell. To this answer plaintiff filed a reply denying each and every allegation, except that she admitted that defendant was a stock broker, and as such, sold her the mining stock as set forth in the fourth defense.

The evidence upon the part of plaintiff consisted of her testimony and that of her sister, together with certain letters and statements received by plaintiff, or by her sister, the contents of which plaintiff had seen. Plaintiff's testimony, briefly and in substance, is: That she had been acquainted with the defendant prior to November 12th, 1900, and that he had solicited her to buy stock in this company, in support of which she submitted a letter addressed to her, dated September 22nd, 1900 (being in the form of a prospectus), stating the production of the mine during the month of August of that year, together with the net earnings and production up to September 18th, and that there was "absolutely no question about the ability of the Butterfly to pay dividends"—closing said letter with the following: "If you have lost money in other stocks this year, this is an opportunity to more than make up your losses, for at the rate at which the shipments are increasing, with an even higher increase in the net earnings each month, we believe the stock is absolutely certain to double in value. We strongly urge you to send in your orders to be executed at market immediately for as much of the stock as you can possibly carry, and feel it is certain to bring you most satisfactory returns, both in dividends and by an even greater gain in its market value;" also a letter to plaintiff's sister, dated

November 10th, 1900, which plaintiff had read prior to her purchase on the 12th, as follows: "When you called to see me last about Butterfly you will remember that I told you to wait until we had certain matters arranged which were then pending, and that if the deal went through on which I was working, you were to take 2,000 shares. I have gotten matters arranged so we are going to close this deal up Monday, and you will be safe in putting every dollar you have on earth into it under the conditions. The stock is selling strongly at 20c and has been for some days, and I believe it is absolutely certain to go up within the next ten days. I understand your position exactly, and I would not accept the order now if we had not gotten things fixed so that I know you cannot lose on it. Please answer by bearer if you can come in Monday morning early. I presume this will interfere with your work, but there is enough at stake to more than make up the loss of an hour or two that day. As I took the order conditionally in this way, you will get the benefit of the market price of the stock on that date. We have all the money pledged we need, and are going to make the payment Monday morning, so that you will run absolutely no risk, and as I know I can make money for you on the rise, I hope Miss Bahrenburg will be able to do something in it as well. When we pay the money over the stock is absolutely certain to advance, and nothing can prevent it. Kindly let me know when to expect you, and believe me,

Yours very truly,

(Signed)

CALVIN BULLOCK."

(Miss Bahrenburg mentioned in the letter is the plaintiff herein, that being her name before marriage.)

On November 12th, 1900, plaintiff went to defendant's office in the Equitable building, taking with her \$1,000 to invest in the stock, at which time she says defendant told her about the ore in sight; and that it would pay dividends for years to come; that she need not fear, "that it was an absolutely safe investment, and that he would see me out with my money, and good interest," and that acting upon his statements and representations, she gave him the money, but that she had decided, before she went to see him, to invest \$1,000 in the stock. For that sum she received 5,000 shares, which she asked the defendant to keep in his vault for her. Thereafter, on the dates named in the complaint, she purchased 2,000 additional shares, paying therefor \$770 including commissions. She testified that at each of the subsequent purchases, namely, in March and August, 1901, defendant again made statements to the effect that the investment was absolutely safe, and that he would see her out with her money and good interest, and advised her to put into the stock every dollar she had or could procure, and that she bought acting upon such statements and representations. On cross-examination she stated that she had such implicit confidence in the defendant that she would have invested the money upon his advice; that she had not asked him for his guarantee. She further testified that in October, 1903, she had a conversation with defendant about this money, at which time he explained the operation of the mine and advised her to wait a year, to await develop-

ments, to which she consented; that at that time he told her the ore had pinched out and the value of the stock had gone down; that he had told her in 1902 the stock had gone down to fifteen cents, or lower, and not to sell it at that low price; that it had been taken off the Colorado Springs Stock Exchange, and that he thought they would strike new ore and the stock would be worth more later; that she did not remember whether she had received printed market reports after the first purchase, but that she had received notice of dividends, and was paid dividends on the stock, the first about January 28th, 1901, of one-half cent per share; the second a couple of months later, of three-quarters of a cent per share, and the third a little later, of three and one-half quarters of a cent per share. Upon each of the purchases defendant sent plaintiff a receipt in the following form:

“Miss M. E. Bahrenburg, City.

Dear Sir—I have bought for your account and risk:

Date	Shares	Stock Price	Commission	Revenue	Tax
Nov. 5,	5,000	Butterfly 20	Net	1,000	1,000
12		By check		Cr.	

Very truly yours,

CALVIN BULLOCK.”

Plaintiff's sister was present at each conversation, and her testimony was substantially the same as plaintiff's. Relative to the conversation in 1902, at which the defendant advised them not to sell and that the stock was taken off the market, she testified: “Q. What did he say—the words, just as near as you can? A. He advised us to hold the stock until later. Q. Go on; tell the rest of it. A.

I don't know as I can—word for word. Q. Just tell in your own words. A. I think I have given it in substance, what was said: that she was to hold and not to sell. Q. Any particular time asked to hold it, or anything of the kind? A. No—for an advance. Q. What did Mrs. Lewis say to that? A. She consented to do so." On cross-examination the witness said that at the conversation in 1902 defendant told them the stock had been taken off the mining exchange, and that there was no present sale for it, and advised them to hold it, saying he believed the mine would develop into a good one.

Throughout plaintiff's examination the court refused to permit either the plaintiff or the defendant to go into the question of the value of the stock. Defendant objected to testimony as to the value of the stock in 1902 and 1903 on the ground that such dates were too remote from the date of the contract to be admissible, but interposed no objection to testimony as to the value of the stock from the date of the purchase "until a reasonable time thereafter."

After plaintiff rested, and upon determining a motion for non-suit, the court, of its own motion, announced that it would require the stock mentioned to be tendered into court, to be delivered to the defendant in case the jury should find for the plaintiff, the return of the stock to be in addition to the allowance of certain dividends which the evidence showed had been received by the plaintiff upon the stock. The stock was so produced.

For the defense, a witness was called and qualified by showing that he was a resident of Colorado Springs in the brokerage business, and had been for

ten years, and in mining stocks; that he was in such business in 1900 and 1901 on The Colorado Springs Mining Stock Exchange; that he knew the Butterfly-Terrible Gold Mining Company's stock; that it was listed on that exchange in the years 1900 and 1901, and that he was familiar with its value and market price during that time; that said stock was sold on the market to a considerable extent. He was asked the market value of the stock between the 12th of November, 1900, and the 1st of September, 1901, but upon plaintiff's objection, was not permitted to answer. Thereupon, defendant made the following offer:

"To prove by the witness now upon the stand, and by other witnesses in attendance, that between the 12th day of November, 1900, and the 1st day of January, 1902, and for some time thereafter, the capital stock of The Butterfly-Terrible Gold Mining Company, being the capital stock of the company referred to in the amended complaint herein, was listed and bought and sold upon the mining exchange of Colorado Springs, and was bought and sold upon the stock market at Denver. That during all of said time the capital stock described in the amended complaint herein could have been sold upon the market at an amount over and above the amount paid therefor by the plaintiff, with good interest thereon. That during a large portion of said time, and within a reasonable time after plaintiff's purchases, the stock could have been sold for not less than forty cents a share, and during a portion of said time, including the months of March, April, May, June and July, 1901, the said stock was worth and could have been sold in the market for between

forty and forty-eight cents a share, and that at no time after the 12th day of November, 1900, to and including the 1st day of December, 1901, was said stock worth at market price less than twenty-three and one-half cents per share, and that a great many thousand shares of stock of said company were bought and sold in the market during said period, at prices ranging from twenty-eight cents per share to forty-eight cents per share." Upon objection by plaintiff, the offer was refused and exceptions taken by the defendant.

Defendant testified that for fourteen and one-half years he had been a stock broker in Denver, buying and selling mining stocks, and other stocks, on commission; that he sold the stock to the plaintiff on November 12th, 1900; that control of the property changed on that day. He denied that at that time, or any other time, he had any conversation in which he stated to plaintiff or to her sister that if they would invest their money in the stock, he would see them out on their money with interest, or anything to that effect; testified that the first 5,000 shares sold to plaintiff, was sold by defendant for a client, and the shares sold her at later dates were purchased by defendant upon the stock market, upon plaintiff's order, and at the market price; that at the time of the conversation in 1903, the mine had been shut down on account of a strike. The amount of ore mined from month to month and from year to year, was shown on a map by different colored lines, which the witness showed and explained to plaintiff. The ore they had been on had pinched out as they went higher in the stope, and it was necessary to go out to the face of the moun-

tain to get the same ore chute at a different depth. When the ore gave out, the revenue stopped, and it was necessary to raise some money to carry on the dead work. Some of the stockholders put up some money to help carry on this work, but no assessments were made. At these times defendant advised plaintiff not to sell her stock, as it was not salable; that the strike lasted for about fifteen months, and it was a case of "wait" for everybody.

The jury returned a verdict in favor of plaintiff for the entire amount of money paid in by her in the purchase of stock, together with interest at eight per cent. per annum from August 10th, 1901, less the sum of \$150, dividends received upon the stock. Upon this verdict judgment was rendered, and defendant appealed to the supreme court.

It will not be necessary to discuss all the errors assigned by appellant, nor, indeed, all that have been relied upon in the argument of his counsel. It will suffice to state generally the reasons which make it necessary to reverse the judgment and remand the cause for a new trial.

The errors assigned relate chiefly to the ruling of the court upon the admissibility of evidence, and upon instructions given, or offered and refused. The correctness of such ruling depends upon the construction of the contract pleaded and the consequent theory upon which the case was tried. The conflicting theories upon which the case was tried are well stated by counsel for appellant: "Assuming that the contract alleged by appellee was made, there were three theories advanced during the trial as to how it should be interpreted. Under the first it is considered that appellant bound himself to pay

to appellee, on demand, the sum of money paid out by her for stock, with interest thereon. The second theory is, that by the contract, appellant agreed to repurchase the stock bought by appellee at what it cost her, and interest; that neither a demand by appellee for such repurchase, nor a tender or offer of the stock by her to appellant, was necessary before she began her action, and that appellee's evidence having shown her contract, it was then sufficient for her to tender the stock at the trial, not voluntarily, but because compelled by the court. By the third theory the contract is construed to be one to save appellee harmless by reason of her purchase of the stock, necessitating loss by her before she could begin her action, and a proof of that loss, and of the extent thereof, before she could recover."

The theory upon which plaintiff tried the case is not in doubt, for her counsel says: "The appellee insisted upon the trial that the contract was one for the direct payment of the money invested, and interest thereon. There were only two conditions in this contract, viz., for appellee to buy and pay for the mining stock, then she was to have her money and good interest on the same. There were no other conditions annexed to this contract. The only fair construction of the contract, in view of the station in life of the parties, their education, knowledge, and the circumstances under which the purchases were made, and the retention of the stock by appellant, is, that appellant would pay her her money and good interest, without any conditions, whenever she demanded it of him." Nor is the theory of appellant in doubt; for, assuming that the words claimed by appellee to have been spoken, were spok-

en by the defendant, with contractual intent, his counsel says: "Obviously the contract was that appellee would not lose by her investment; that she would be able so to dispose of her purchase that she would receive back her money invested and good interest. In view of the situation of the parties, the results sought and the subject-matter of the contract, no other construction or interpretation is reasonable or even possible. It was a contract of indemnity against loss. All that appellee sought, expected or desired, was an assurance that she would not lose the money she invested or the interest thereon."

The learned judge who presided at the trial seems not to have adopted the theory of either the plaintiff or the defendant. But, if we judge correctly from his remarks made during the trial, his action in requiring the stock to be produced and tendered, and the instructions given upon the measure of damages, the court adopted the second of the three conflicting theories hereinbefore set forth, namely, that the contract was for the repurchase of the stock. Such is indicated by his remark during the progress of the trial that the second cause of action was "based upon a promise to redeem the stock," followed by his order requiring the stock to be produced and tendered without the same having been pleaded, over the objection of the defendant, and without the approval of the plaintiff, who, in her brief, said: "Appellee was at a loss then, as now, to see any reason or rule or right of the court, upon its own motion, to require her to tender the stock into court. Appellee never has claimed, and does not now claim, that her contract with the

defendant was one to repurchase the stock on demand."

The instruction, that if the jury find for the plaintiff, she would be entitled to recover the sum of money paid by her to the defendant, together with interest from August 10th, 1901, the date of the last purchase, and from which date interest was claimed by the complaint, could only be based upon the theory announced by plaintiff, or, upon the theory that the contract was for the repurchase of the stock, upon demand, for the purchase price with interest.

The supreme court, in *St. Louis etc. Co. v. Tierney*, 5 Colo., 582, announced certain elementary rules applicable to a correct interpretation of the contract under consideration. We quote from the syllabi:

"It is an elementary principle that the object to be attained in the construction of a contract, is to discover and effectuate the intention of the parties, and to this end the court will adopt that construction which will bring it as near the actual meaning of the parties as the words they saw fit to employ, when properly construed, will permit. As a guide to a correct interpretation, the law also permits the subject-matter of the contract, the situation of the parties at the time of its execution, and all the surrounding facts and circumstances to be taken into consideration. A party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties."

With these rules in view it is impossible to adopt the theory of plaintiff. It seems wholly un-

tenable. The transaction was not in the nature of a loan from plaintiff to defendant, nor of a deposit payable on demand. It was, and was by them understood to be and treated as, an investment of plaintiff's money by defendant in mining stocks which did not belong to him, upon plaintiff's order, from which she hoped to receive large profit from an early advance in the market value of said stock, predicted by defendant and predicated upon the conclusion of certain changes in the affairs of the mining company, negotiations for which were then pending, and the promise of dividends from the showing made in the mine. The promise of defendant, under any reasonable construction of the contract, was conditional, so far as his liability to plaintiff was concerned, upon her sustaining loss on the investment by depreciation of the stock, and her consequent inability to recover the amount paid therefor by a resale, or failure of the stock to rise in value, or pay dividends, so that she could realize an advance upon the purchase price equal to good interest on the capital. The situation of the parties and their conduct prior, at the time of and subsequent to the purchase, exclude the possibility of the correctness of plaintiff's theory. Aside from the formal demand made just prior to beginning suit, there is no evidence that at any of the many conversations between plaintiff and defendant, during more than six years that elapsed between the purchase of the stock and the commencement of the suit, a demand was made upon the defendant to pay or repay the money invested, or even the loss thereon. Plaintiff testified that she asked about the money and that defendant requested her to wait,

but it is clearly shown by her own and her sister's testimony that this referred to her inquiry about her stock, and the defendant's advice to wait for a more favorable time to sell.

Nor do we think the contract is susceptible of the construction apparently placed upon it by the court that it contemplated the repurchase of the stock by the defendant. "A fundamental canon of construction, with reference to contracts oral and written, requires that the true intent or meaning of the contracting parties shall be ascertained and the contract be construed, if possible, so as to carry out such intent."—*Wolff v. Helbig*, 21 Colo., 490, 498. It is certain that neither plaintiff nor defendant so understood it. Plaintiff at no time prior to suit offered to return the stock. She did not offer it by her pleading, nor make a tender thereof until required so to do by the court. It seems unusual to force a construction by which the parties to the contract are declared to have had an intention which both deny. Both plaintiff and defendant having repudiated that theory, we are not disposed to give it further consideration, although it seems to be the only theory upon which the instruction of the court as to the measure of damages could be predicated, as we take it for granted that the court did not adopt plaintiff's theory. Taking into consideration the words used, to-wit, that he would see her out with her money with good interest, and that she should lose nothing upon the investment, together with the situation of the parties at the time, and all the surrounding facts and circumstances, a reasonable construction, and we think the only construction that can be given to the contract,

is, that it was one of indemnity against loss; or, guaranty, that in case of loss defendant would reimburse plaintiff to the extent of such loss. Upon that view, the instructions of the court as to the measure of plaintiff's recovery, constituted error for which the judgment must be reversed. The contract being one of indemnity, the plaintiff must show a loss, and the extent of recovery would be the loss sustained, measured by the difference between the highest value of the stock within a reasonable time after the purchase, and the amount paid for the stock with interest added, less any dividends received thereon, as shown by the evidence; such reasonable time to be determined by the jury under appropriate instructions which take into consideration the fluctuating and uncertain values of mining stocks. And the failure of plaintiff to avail herself of opportunities to realize upon her investment within such reasonable time might be a good and complete defense to the action

Defendant offered the following instruction which was refused by the court:

"The court instructs you that the burden of proof is upon the plaintiff to show by the preponderance of the evidence not only that the contract alleged by her was made by the defendant, but that she has suffered loss or damage thereunder, and that unless you find by a preponderance of the evidence that the stock purchased by the plaintiff was, within a reasonable time after such purchase, of no value, and continued to be of no value down to the present time, then the plaintiff has not suffered the entire loss which she claims. If you believe from the evidence that the stock was of some

value, and could have been sold in the market for some price, then the damage which the plaintiff has suffered, in case you find the contract was made as alleged, is the difference between the highest value of such stock within a reasonable time after she purchased it, *or at any time thereafter*, and the amount she paid for the same, with interest on such difference, and loss any dividends she may have received upon such stock."

This instruction correctly stated the law with the exception of that portion which gives the highest price of the stock, *at any time after the purchase*, as a basis for computing loss. We think the plaintiff would be entitled to a reasonable time after each purchase within which to consider and determine whether she would sell the stock or wait for a better price, that being reasonably within the contemplation of the parties, in view of the promise of dividends as well as increase in market value. The following cases are cited in support of the views announced as to the character of the contract and the measure of recovery.—*Norris v. Reynolds*, 116 N. Y. Supp., 106. *Brewster v. Countryman*, 12 Wend., 446. *Belcher v. Loveland*, 119 Mass., 539. *Jenckes v. Rice*, 119 Ia., 451. *Lobeck v. Duke*, 50 Neb., 568. *Kilbride v. Moss et al.*, 113 Cal., 432.

The case of *Norris v. Reynolds*, *supra*, was one in which a sale of stock was made by a promoter interested in the corporation, who said to plaintiff, "I will guarantee your money, principal and interest. For whatever amount you invest in the stock, you will have my personal guarantee." In construing this contract, the court said:

"From the plaintiff's own testimony and the

correspondence that passed between the parties, it is quite plain that although the word "guarantee" was used, all that the defendant agreed to do was to indemnify the plaintiff against loss in case he should make the investment. The defendant did not agree to repurchase the plaintiff's stock on demand.

* * * Proof that neither the original stock nor that of the cemetery association had any market value on the stock exchange, was not sufficient proof that plaintiff's investment had become a total loss and had no present value whatever. Many kinds of investments and stocks may have some value although not dealt in on the stock exchange. In order to maintain his action against the defendant, upon the defendant's contract of indemnity against loss, the plaintiff must prove that he has actually suffered loss. * * * In order, however, to call upon the defendant, upon his contract of indemnity against loss, he must show by competent evidence that after the lapse of a reasonable time his stock, or the property right represented by it, has become worthless, or partially worthless. This can be done by showing through some competent witness, the value of the stock with the rights attached to it."

This case seems to have been well considered, the reasoning sound, and the conclusion pertinent and applicable to the instant case. From the views we have expressed it follows that in refusing to admit the testimony offered by the defendant to show the value of the stock from the time of the several purchases, and for a period of some months thereafter; in requiring the stock to be produced and tendered; in denying motion for non-suit, and in giving instructions not applicable under a proper

construction of the alleged contract, the court erred. The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein announced.

[No. 3466.]

- COORS V. BROCK.

1. EVIDENCE—*Judicial Notice—Municipal Ordinance.* The courts will not judicially notice the provisions of a municipal ordinance.

2. NEGLIGENCE—*A Question for the Jury.* In an action for an injury attributed to the negligence of defendant's servant in driving a team and colliding with plaintiff while riding a bicycle upon the public streets, an instruction that "it was plaintiff's duty, at his peril, to keep out of the way of defendant's team in case they should be suddenly turned to the right" would be a clear usurpation of the province of the jury.

So, an instruction that the "swerving of defendant's team to the right, in stopping, would be justifiable, though plaintiff was riding by his side."

So, an instruction which exonerates the driver, if he "did not know" of plaintiff's situation, in time to have avoided the collision, omitting the qualification that the driver, by due care, might have known of it.

3. INSTRUCTIONS—*Construction.* The charge of the court is to be taken as a whole. An instruction, which by itself, might be erroneous, may be qualified by what appears in another part of the charge.

4. NEW TRIAL—*Passion or Prejudice.* That the jury give credit to the witnesses examined for one party, rejecting the adversary testimony, is not evidence that they act from passion or prejudice.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. EZRA KEELER, for appellant.

MESSRS. BICKSLER, BENNETT & NYE, for appellee.

KING, J., delivered the opinion of the court.

This case was before the supreme court upon a former appeal in which a judgment for the plaintiff was reversed, because of error in certain instructions given by the court to the jury (*Coors v. Brock*, 44 Colo., 80). The cause was again tried and upon verdict of the jury judgment was rendered, from which the defendant again appealed.

The complaint alleged that while plaintiff was riding a bicycle near the intersection of Lawrence street in the city of Denver, defendant's servant so negligently and carelessly drove a two-horse team and wagon that without fault or negligence on the part of plaintiff, the horses of defendant struck plaintiff and threw him off his bicycle upon the ground, thereby inflicting injuries to his person and bicycle, for which he seeks compensation.

The answer admitted defendant's ownership of the team and wagon, and that the same was being driven by defendant's servant; that while plaintiff was riding his bicycle he came into collision with defendant's horses and was thereby thrown from the bicycle to the ground, but avers that plaintiff's alleged injuries were caused through the negligence of plaintiff, directly contributing thereto in consequence of his riding into and against one of defendant's horses, without fault or negligence on the part of defendant or his servant. All other averments of the complaint were denied by the answer, and all averments of new matter in the answer were denied by reply.

A rather full statement of the evidence as it ap-

peared upon the first trial is given in the opinion delivered by Mr. Justice Maxwell in *Coors v. Brock*, *supra*, which differs to some extent from the evidence upon the second trial.

Plaintiff's testimony shows that he overtook defendant's team and wagon at the intersection of Curtis street with Nineteenth street, from which point he traveled alongside of defendant's wagon for about two blocks—to the corner at Nineteenth and Lawrence streets; that they were travelling upon the right side of Nineteenth street, plaintiff on his bicycle about three feet from the curb and directly opposite the driver upon the front end of his wagon which was nearer the middle of the street than, and about seven feet from, the plaintiff; that both were going about eight miles per hour; that while approaching Lawrence street, and about twenty-five feet therefrom, plaintiff saw a street-car coming down Lawrence street from Twentieth street, running at a high rate of speed; that he was unable to see the car sooner because of a building upon the corner of the block; that upon seeing the car he suddenly checked the speed of his wheel, intending to run behind the car and down on the righthand side of Nineteenth street to his place of business; that defendant's team turned suddenly to the right toward plaintiff; to save himself plaintiff turned into the curbing as closely as he could but the horses caught him at the corner of the curb, knocked him down and trampled upon him and his wheel after he struck the ground; that there was nothing to prevent the driver from seeing plaintiff, and no obstructions to the left of the driver. Plaintiff was severely and permanently injured. His testimony was supported by a wit-

ness to the accident who stated that she saw the driver whirl his horses to the right, throwing plaintiff under the team to the ground.

The driver testified that he did not see plaintiff until plaintiff came into collision with one of the horses; that he first saw plaintiff as he brought his horses to a stop, at which time his horses' heads were near the first rail of the car track crossing Nineteenth street (the car being upon the opposite track); that in stopping his team he pulled it a little to the right when the wheelman passed from behind the wagon and ran into the off horse. The driver's testimony was strongly supported by some of defendant's witnesses, but in some respects it was not supported. Some of such witnesses testified that plaintiff was riding rapidly with his head down upon the handle bars and that while so riding he ran into defendant's team. It will thus appear that the testimony was materially and sharply conflicting. There was sufficient competent evidence to justify the jury in finding either for the plaintiff or for the defendant in accordance with their views of the credibility of the witnesses and the weight to be given to their testimony in connection with the conditions and circumstances surrounding the occurrence.

Defendant's assignments of errors raise a number of objections, those relied upon in argument being the refusal of the court to give certain instructions requested by him, and the giving of the second instruction over the objection of the defendant, and refusal to set aside the verdict.

The first instruction requested and refused related to the law governing the use of vehicles on the street, by which the defendant asked the court to in-

struct the jury, among other things, that the rider or driver of a vehicle must "keep within fifteen feet of the corner of the curb when turning to the right into another street, and it must necessarily follow that in passing another vehicle going in the same direction, it must pass such vehicle on the left." Certain ordinances of the city of Denver were offered and received in evidence, but there is no such provision in the ordinances introduced. This court cannot take judicial notice of the provisions of ordinances of municipal corporations. *Garland et al. v. City of Denver*, 11 Colo., 534.

By defendant's instruction No. 2 the court was asked to instruct the jury that, while riding along the street, as shown by the testimony, it was "plaintiff's duty at his peril to keep out of the way of defendant's team in case they should be suddenly turned to the right, either in stopping or meeting another vehicle, or in turning to the right into another street." Such an instruction would have been a clear usurpation of the functions and province of the jury. The evidence did not show acts of plaintiff constituting negligence *per se*.

By defendant's instruction No. 3 the court was requested to instruct the jury that, under the evidence if the team was caused to swerve to the right, "such swerving of the team to the right in stopping would be justifiable on the part of the driver although the plaintiff were riding along by his side." the determination of that question also was one of fact for the jury and not of law for the court.

By instruction No. 9 the court was requested to instruct the jury that if the driver of defendant's team did not know of plaintiff's situation in time to

have avoided the collision, the verdict should be for the defendant. This instruction, as requested, omitted the very important qualification that the defendant's driver might, by ordinary care, have known the plaintiff's situation.

From the foregoing observations upon the instructions requested and refused, it will appear that the court did not err in refusing to give them in the form requested. Such portions of the instructions requested as state the law, together with other instructions requested and refused, were substantially incorporated into the instructions given by the court.

Error is assigned to instruction numbered two as given by the court because it omitted all reference to contributory negligence on the part of the plaintiff. A full and correct statement of the law as to contributory negligence was given in other instructions, and the jury was further admonished that all of the instructions must be taken and considered as a whole.

We think the court did not err in refusing to set aside the verdict. For while it was manifestly contrary to the evidence of defendant's witnesses, it was in consonance with that of the witnesses for plaintiff, and the mere fact that the jury chose to believe one set of witnesses rather than another is not evidence that the jury acted under the influence of passion or prejudice. The evidence does not warrant the court in holding, as a matter of law, that the injury to plaintiff was caused by his contributory negligence. There is no condition conclusively appearing from the evidence which required defendant's team to be turned or permitted to turn abruptly to the right in stopping for the car to pass, in view of the distance

between the team and such passing car; nor reason why, with the exercise of ordinary care, the horses should not have been kept from trampling upon plaintiff after he was down.

Finding no material error in the record, the judgment of the trial court will be affirmed.

[No. 3511.]

ANIMAS CONSOLIDATED DITCH CO. v. SMALLWOOD ET AL.

1. *CONTRACTS—Construction.* A contract should be construed as a whole and in the light of known physical facts concerning the matter affected by the agreement.
2. — *Conduct of Parties.* The conduct of the parties to a contract, while engaged in its performance, before controversy arises, is the best indication of what the parties intended thereby.
3. — *Construed.* A land owner being entitled to four cubic feet of water per second of time, granted to an irrigating company a right of way over his land, along the line of his ditch, the company agreeing to enlarge, maintain, and operate the ditch "in such manner that at all times * * * at least four cubic feet of water will run through the same upon the land" * * * and to deliver "during all such time, * * * upon the land * * * four cubic feet of water per second of time * * * at such places upon said land," not exceeding eleven in number, as the land owner should designate, and from boxes of such capacity as the land owner might prescribe, provided the total capacity of all the boxes should not exceed four cubic feet per second of time, and that the land owner should have the right, at all times, to open and close the boxes as he might desire. The company accordingly constructed and placed ten boxes in the ditch, at places designated or consented to by the land owner, and the same were operated and used for several years. By reason of the broken and uneven surface of the land it was necessary, in order to properly irrigate it, that the specified number of boxes should be set and maintained. *Held* that it was manifest from the terms used that the land owner was not intending to relinquish any right or privilege which he then enjoyed; that the boxes must be of such size as to give a head, and permit the passage of a sufficient volume of water to

perform efficient service; that it was not a reasonable construction of the contract that the land owner should be required to use all of the boxes at one time; that he was not to be confined to boxes so small that the total capacity would be only four cubic feet per second; that he was entitled to enjoy at all times four cubic feet of water per second of time, through such of the boxes as he might elect to use, and the boxes must be of such size as to enable him to draw the specified volume of water through any part of them.

4. INJUNCTION—*Decree*. At suit of those holding under the land owner the irrigating company was enjoined from interfering with or preventing plaintiffs from opening or closing any or all of the boxes, at the same time, or otherwise; and the plaintiffs were enjoined from diverting to the land, at any one time, more than four cubic feet of water per second. Held that the latter clause of the decree was not sufficiently specific; that it should have confined the plaintiff to the use of boxes, at one time, the total capacity of which should not exceed four cubic feet of water per second of time.

Appeal from La Plata District Court. HON. CHARLES A. PIKE, Judge.

MESSRS. RITTER & BUCHANAN, for appellant.

Mr. O. S. GALBREATH, for appellees.

Presiding Judge SCOTT delivered the opinion of the court.

The complaint of the plaintiff in this case, filed in the district court of La Plata county on the 6th day of January, 1908, alleged in substance that their grantor, William Embling, was on the 12th day of March, 1900, and prior thereto, the owner in fee of a tract of land situated in sec. 36, twp. 37 n., r. 9 w., together with a water right of four cubic feet of water belonging thereto, and a ditch and right-of-way for said ditch to convey said water from the Animas river, from which said water was taken, to and on the said lands for irrigation and domestic purposes. That

the defendant, the Animas Consolidated Ditch Company at that time, desiring to construct its ditch across said lands, and for the purpose of securing right-of-way for their ditch over the lands of Embling, entered into a written contract with him for such purpose. In this contract it was agreed that Embling should make, execute and deliver to the defendant a quit claim deed to the right-of-way for defendant's ditch along the line of Embling's ditch then existing, and twelve and one-half feet on each side of the center thereof.

It was further agreed that the defendant, company, should construct and enlarge the said ditch, and maintain and operate the same and keep it in repair at its own expense, in such manner that at all times during the irrigation season, that at least four cubic feet of water will run through the same upon the lands of Embling. That part of the agreement in dispute in this case is as follows:

“And the party of the second part agrees that it will during all such time deliver to the party of the first part, upon the land above described, four cubic feet of water per second of time, which said water shall be delivered at such places upon said land as the party of the first part shall designate in writing before the completion of said ditch, not exceeding eleven places, said delivery to be made from boxes to be constructed, operated and maintained by the party of the second part, of such capacity as the party of the first part may designate, provided the total capacity of all said boxes shall not exceed four cubic feet of water per second of time, provided further, that said party of the first part shall have the right

at all times to open and close the said boxes as he may desire."

The complaint further alleged that it was the intention at the time to secure to the said Embling the convenient and efficient use of four cubic feet of water for irrigation purposes; and that the lands are so situated that it is impossible to successfully or conveniently irrigate the lands of the plaintiff except by the use of the number of boxes named in the agreement, and that the use of the proviso therein contained, that "the total capacity of all of said boxes shall not exceed four cubic feet of water per second of time," if construed as defendant contends, was a mistake and was intended to mean that no more than four cubic feet of water should be used at any one time.

The complaint further alleged that the company enlarged said ditch as agreed, and upon its own initiative placed ten boxes on the lands of the plaintiff's; and at the points suggested by the said Embling, and that the same have been operated since 1902, and for six consecutive irrigation seasons; that the defendant company on or about the 1st day of June, 1907, forcibly caused eight of the said boxes to be closed down, so that plaintiffs were unable to use the same, and by reason of which action their crops were destroyed in the year 1907, to their damage in the sum of \$500.00.

It was further alleged that if defendants continue to keep the boxes so closed plaintiff will suffer irreparable damage. The prayer of the complaint was for actual damage and for injunctive relief.

The answer of the defendant is an admission of the allegations as to the contract, and as to the action

of the defendant in closing down the eight boxes referred to. The answer further alleged the right to do this under the terms of the agreement, and denied damage.

The findings of the court appear to be fully justified by the evidence. These findings were in substance as follows:

That the plaintiffs are the owners and occupants of the land in question; that irrigation is essential to cultivation and successful raising of crops on the land; that the plaintiffs are the owners of four cubic feet of water per second of time, which has been applied to domestic and irrigation purposes, on said lands, for many years past; that plaintiffs planted said lands to crops for the year 1906, as well as for many years last passed; that defendant is a corporation and owner of the ditch known as the Animas Consolidated ditch which takes its waters from the Animas river from a point on said river above the lands of the plaintiffs.

The court further found as a matter of law that by virtue of a contract made and entered into by and between the defendant and one William Embling, from whom plaintiffs derived their title and rights to said lands and waters for irrigation and domestic purpose, the defendant is bound to carry for plaintiffs, four cubic feet of water per second of time through its said ditch from the said Animas river to and upon the lands of the plaintiffs. The same to be delivered upon said lands, at such places upon the same, as the said William Embling should designate not exceeding eleven places. That said water shall be delivered as aforesaid from boxes as constructed, operated and maintained by the defendant, of such

capacity as should be designated by the said Embling; and that the said Embling shall have the right to continue to open and close said boxes as he may desire.

The court further found that at or about the time of the completion of the defendant's ditch, and at the request of the said Embling, defendant placed ten boxes in its said ditch, through which the said Embling and his successors in right have, from year to year, received and applied said four cubic feet of water per second of time to domestic and irrigation purposes on said lands. That the plaintiffs have a right to the use of any amount of water not exceeding four cubic feet per second of time, at any and all times during the irrigation season, through any one or more of said boxes as he may desire, provided that the total amount so used by him through any one or more or all of said ten boxes, at any time shall not exceed the total amount of four cubic feet per second of time.

It was further found by the court that it is the duty of this defendant to keep and maintain the said ten boxes as at present located along the line of said ditch, and to deliver on the lands of said plaintiffs through the said boxes the said four cubic feet of water, or any part thereof as plaintiffs may desire at any or all times, without let or hinderance, and for that purpose to allow the plaintiffs to open and close the boxes, or either of them, as they may choose.

It was further found that heretofore and during the irrigation season of 1906 (and this seems to be a clerical error because the complaint and the testimony shows this to have occurred in 1907), the defendant wrongfully closed or caused to be closed a

number of boxes and refused to allow the plaintiff to open them or to use water through them, to plaintiff's great and irreparable damage and injury.

The court further found that by reason of this act that plaintiffs suffered damage to their crops in the sum of \$100.00. The defendant was forever enjoined from interfering with or preventing plaintiffs from opening or closing the ten boxes heretofore used by them for receiving and applying four feet of water per second of time to domestic and irrigation purposes on their lands as they may choose, whether they open or close one or more, or all of said boxes at the same time.

The defendant was further enjoined from nailing up said boxes, or in any manner interfering with their use by the plaintiffs. The court also enjoined the plaintiffs from using more than four cubic feet of water at any one time. It is from this judgment and order that the defendant appeals.

Substantially all of the contention of the appellant is based on the proviso in the agreement, "provided the total capacity of all of said boxes shall not exceed four cubic feet of water per second of time," and it is argued that while the plaintiffs may under the agreement have ten boxes, yet the total measuring capacity of all these shall not exceed four cubic feet, as water is measured, and that therefore the court by its judgment has made a new contract for the parties.

The contract should be construed as a whole and in the light of well known physical facts concerning the matters affected by the agreement. The intention of the parties should govern. *Fearnley v. Fearnley*, 44 Colo., 422; *C. B. & Q. Ry. Co. v. Provolt*,

42 Colo., 103; *Tillett v. Mann*, 104 Fed., 142; *San Miguel G. M. Co. v. Stubbs et al.*, 39 Colo., 365; *True v. Rocky Ford Canal and Land Co.*, 36 Colo., 43.

Embling at the time of the agreement owned a ditch and the right to the use of four cubic feet of water per second of time, and was in the actual use of this water for the purpose of irrigation through his own ditch, on the very lands now owned and irrigated through the ditch of defendant.

It is clear from the whole agreement that Embling did not intend to release or relinquish to the defendant any right or privilege he then enjoyed. These were to be preserved to him by the defendant, who in consideration was to secure the right of way alone, to carry its waters through an enlarged ditch over Embling's lands.

The testimony shows that by reason of the unevenness of the land it is necessary to have the number of boxes which had been used for years, under the agreement, in order to properly and efficiently irrigate his lands.

It is true that defendant's engineer testifies that this water could otherwise be used by constructing another ditch below and parallel with defendant's ditch, involving the use of flumes over the uneven land, but the plaintiffs were under no obligation to do this. The evident purpose and declaration of the agreement was that the water was to be used directly from defendant's ditch, and to accomplish this the large number of boxes to be used was agreed on.

It is further made clear by the evidence that the boxes must be of sufficient size to give head so as to permit the water to pass through in order to perform the service intended. And also that to use ten boxes

so small that the total carrying capacity would be four cubic feet per second of time was not, and could not be sufficient to make proper use of the water in the irrigation of plaintiffs' lands.

It is common knowledge that force and volume are essential for the purpose of proper delivery of water in such case. It was clearly not contemplated and is not in evidence that plaintiffs used all of these boxes at any one time.

It is not reasonable to believe that either party to the agreement intended that in order to secure the delivery of the four feet of water, Embling should use ten boxes at the same time, and that these should be all running at the limit of capacity.

That the right to use such of the boxes and at such times as the plaintiffs may require for the sufficient irrigation of their lands, limited to the four cubic feet, seems beyond question for it is so expressed in the contract, wherein it is said: "Provided, further, that said party of the first part shall have the right at all times to open and close the said boxes as he may desire."

It is apparent from the testimony, that for the court to construe the contract as contended by appellant, would be to deny the plaintiffs the very rights possessed before the contract and guaranteed under it, that is to say the proper and efficient use of four cubic feet of water for the irrigation of his lands.

The defendant was and is in the business of supplying water for irrigation. It must be presumed to have known all these physical facts at the time, and contracted accordingly. But it is apparent that the defendant did not at the time construe the contract as it now contends, for it constructed the ten boxes

that were afterward and now used by plaintiffs, and placed them, under its own construction of the agreement, and at the places indicated by plaintiffs' grantor and continued to so maintain them for six consecutive years thereafter.

The best indication of the true intent of the parties to a contract is the practical interpretation given by the parties while engaged in their performance of it and before any controversy had arisen, and the object of the parties at the time should be taken into consideration. *Manhattan L. Ins. Co. v. Wright*, 126 Fed., 82; *Orman v. Potter*, 46 Colo., 57; *Jennie v. Brotherhood*, 44 Colo., 77.

But the judgment of the court in so far as it limits the plaintiffs to the use of four cubic feet of water at any one time, was not sufficiently specific as to meet a fair construction of the agreement, which under all the circumstances may reasonably be said to have intended that the total capacity of the boxes used at any one time, shall not exceed four cubic feet of water per second of time. It would not seem to be a fair interpretation of the agreement upon its face, nor under the action of the defendant, to say that plaintiffs were to be permitted to use all of the ten boxes so placed and having a total capacity of much more than four cubic feet of water at any one time. Neither can it be fairly said that it was intended to limit the plaintiffs to a fewer number of boxes than stipulated in the agreement, and afterwards placed by the defendant, for the convenient and efficient use of the water to which plaintiffs were entitled for the irrigation of their lands.

The order of the court should have confined the plaintiffs to the use of four cubic feet of water, the

amount originally owned by their grantor and reserved in the agreement, and should have also restricted plaintiffs to the use of this water in such manner that they will not be permitted to use a greater number of boxes, of whatever capacity at any one time, the total capacity of which boxes so in use, shall not exceed four cubic feet of water per second of time.

With such modification of the order of the court, the judgment is affirmed.

All the judges concurring.

[No. 3513.]

VANDERMEULEN V. BURWELL.

1. *TAX TITLES—Void Deed.* A tax deed recited that the treasurer "on November 15 * * * at an adjourned sale begun and held on October 10," sold the lands afterwards described, to the county. *Held* to import that the lands were struck off to the county on the first day they were offered, and that the deed was void upon its face.

2. — *Deed Executed by Treasurer of Wrong County.* Subsequent to the tax sale the lands are transferred to another county. Only the treasurer of the latter county has authority to execute a tax deed upon such sale. A deed by the treasurer of the former county is void.

3. — *Burden of Proof.* One claiming under a tax deed has the burden of proving the assessed value of the land, and if this exceeded \$250, whether the land was then occupied or vacant, and that notice of the time of redemption was given as required by the statute (3 Mills Stat., sec. 3902a, Rev. Stat., sec. 5727). Failing to give evidence of these matters the deed must be excluded.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. EZRA KEELER, for appellant.

Mr. ISAAC PELTON, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

This action is one to quiet title to the sw. $\frac{1}{4}$ of sec. 21, twp. 5 s., r. 52 w., in Washington county. The plaintiff alleged and proved title in himself derived by mesne conveyances from the government.

The defendant relied on three certain tax deeds based on as many sales of the premises for taxes. The court excluded each of these tax deeds as evidence for the reasons hereinafter suggested, and rendered judgment for the plaintiff.

The first deed is dated November 16th, 1901, and is based on a sale of 1898 for the taxes of 1897. The deed recites:

“And whereas, the treasurer of said county did on the 15th day of November, A. D. 1898, by virtue of the authority vested in him by law, at (an adjourned sale), the sale begun and publicly held on the 10th day of October, A. D. 1898, separately expose to public sale, at the office of the county treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such cases made and provided, the several parcels of real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid, respectively, on each of the said parcels of property as offered for sale as aforesaid; and whereas, at the time and place aforesaid, Arapahoe county, of the county of Arapahoe, and state of Colorado, having separately offered to pay the sum due on each of the said parcels, in all amounting to the sum of twenty dollars and fifty-three cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property for the whole of

each of said parcels of real property, viz.: (here follows description of property sold, same as above set forth as property taxed), which was the least quantity bid for, and payment of said sum having been made by it to the said treasurer, the said parcels of property were separately stricken off to it at that price."

It will be seen from this that the tracts of land conveyed in this deed were struck off to the county on the first day they were exposed for sale and that they were not on the previous days of the sale offered or exposed for sale.

Under the uniform holdings of this court, the deed was void on its face.

The second tax deed relied on by defendant was dated January 2d, 1907, and based on a sale of 1902 for the taxes of 1901. The sale was to one W. T. Lambert and was by the county treasurer of Arapahoe county. The deed was by the county treasurer of the City and County of Denver while at its date and for several years prior thereto, the lands conveyed were situated in the county of Washington.

It was not within the power or authority of the treasurer of the City and County of Denver to issue such tax deed. Such power lay exclusively with the county treasurer of Washington county. The deed was, therefore, and for this reason, void on its face.

Pollen v. Magna Charta M. & M. Co., 40 Colo., 89.

The third tax deed relied on was dated June 31st, 1907, and was by the county treasurer of Washington county.

Objection was made to the introduction of this deed for the reason that there was no proof that the

assessed valuation was less than \$250.00, or that the notice required by the statute was given.

The objection was sustained by the court and the deed excluded. It was said by Mr. Justice Steele in *Mitchell v. Trowbridge*, 47 Colo., 6:

"The defendant having relied upon the treasurer's deed as a muniment of title, the burden was upon him to show a compliance with the law, except as to such matters as by the deed itself are made prima facie evidence by sec. 3902, 2 Mills. Ann. Stats. It, therefore, was incumbent upon him to show: (1) The assessed value of the property, and if five hundred dollars or over, that notice of the time of redemption had been given as required by the statute, sec. 3902a, 3 Mills' Ann. Stats. (2) Whether at the time the notice was required to be given, the land was occupied or vacant, and if occupied that he had served notice upon the occupant or occupants, as well as upon the other persons described in the statute. The defendant failed to show that the assessed valuation was under five hundred dollars, and failed to show that the premises were vacant and unoccupied. The treasurer's deed, therefore, was not admissible. *Richards v. Beggs*, 31 Colo., 106; *Treasurer T. W. & R. Co. v. Gregory*, 38 Colo., 212."

No prejudicial error appearing in the record the judgment is affirmed.

All the judges concurring.

[No. 3515.]

INTERNATIONAL IMPROVEMENT CO. V. WAGNER.

CONTRACTS—*Construed.* The International Improvement Company, defendant, issued to plaintiff its bond agreeing to pay him a sum specified at a future date named, subject, among others,

to the privilege and condition (1) that the bond might "apply on the purchase of real estate for sale by the company, subject to its regular selling conditions;" (4) That after a certain time specified the holder "may borrow 75% of the amount paid in, with bond to maturity by complying with its conditions," and (11) "This bond being the contract between the owner, and the corporation, the owner is not liable for any obligations of the company."

Held that, in view of the fact that the name assumed by the corporation was not in compliance with the statute (3 Mills Stat., sec. 280, Rev. Stat., sec. 951), and in view of the provisions of the eleventh privilege and condition, all possibility of the mutual rights and obligations which obtain between Building & Loan Associations and their members, was excluded; that plaintiff suing for the failure of the company to make a loan as stipulated by the fourth condition was not required to show that the corporation had on hand funds which could lawfully be applied to such loan; that the plaintiff was not a member of the association; that the phrase "may borrow" in condition four, did not leave it optional with the company to make or refuse the loan; that the holder of the bond had a clear right to the loan, and it was the clear obligation of the defendant to make it.

2. CORPORATION—*Name*. The statute providing that certain words "shall form a part of the corporate name" of each of a certain class of corporations, a corporation which adopts a name not containing the statutory words will not be regarded as belonging to the particular class required to be so designated.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Messrs. TOLLES & COBBEY, for appellant.

Messrs. BARTELS, BLOOD & BANCROFT, for appellee.

Presiding Judge SCOTT delivered the opinion of the court.

This is an action by the appellee for breach of contract upon what purports to be a bond of appellant, the substantial part of which is as follows:

“This is to certify, that in consideration of the payment of five hundred and eighty (580) dollars to be paid upon delivery of this bond, and of the payment of twenty (20) dollars to be paid on the first day of every successive month for a period of 115 months from the date hereof, The International Improvement Company promises and agrees to pay to John M. Wagner, of Ogden, State of Utah, the sum of four thousand (4,000) dollars, at its office at Denver, Colorado, 97-12 years from the date hereof. This bond is subject to the provisions hereon endorsed, which are hereby referred to and made a part of the same. This bond may be applied to the purchase of real estate for sale by the company, subject to its regular selling conditions. It may be transferred by endorsement and record thereof on the books of the company acknowledged hereon.

IN WITNESS WHEREOF, The International Improvement Company has caused this bond to be signed by its president and attested by its secretary at its office at Denver, Colorado, this first day of January, A. D. 1906.”

The bond contained twelve subject provisions or endorsements entitled “privileges and conditions.” Of these it is necessary to notice two only:

“First. At any time with interest and profits added; to apply in the purchase of real estate for sale by the company, subject to its regular selling conditions.

Fourth: At any time after two years the legal holder of this bond may borrow 75 per cent. of the amount paid in, with bond to maturity by complying with its conditions.”

The complaint set up two causes of action, but a

demurrer was sustained to the second cause and the trial was had upon the first.

This alleged, among other things, a compliance with all the terms and conditions of the bond, and the payment by the plaintiff to defendant of the principal sum of the bond on the day of its date, together with thirty monthly payments of \$20.00 each. Also failure and refusal upon the part of the defendant to comply with provisions *one* and *four*, as above set out, in that the defendant had failed and refused to sell the plaintiff real estate and apply the accrued values thereon as agreed; also failure and refusal to loan to the plaintiff seventy-five per cent. of the value as agreed in provision four.

The prayer was for damage in the sum of \$1,180.00, being equal to the total amount paid by the plaintiff including the monthly payments.

The answer admitted the failure to make the agreed loan to the plaintiff, but alleged as a reason therefor, that there was not and had not been since plaintiff's application, sufficient funds on hand to make such loan, and that there were other applications for loans antedating that of plaintiff, not yet complied with, and that plaintiff would be made a loan, if he was entitled to one, when his turn is reached on the books of the company. The answer further denied the allegation as to failure and refusal of the defendant to apply the payments he had made upon the purchase of real estate.

The evidence offered upon the part of the plaintiff seems to fully support the complaint.

The defendant interposed a motion for non-suit, presumably, as gathered from the language, upon the ground that the complaint does not state facts suf-

ficient in law to constitute a cause of action against the defendant. This motion was overruled and the defendant declining to offer any testimony the court directed a verdict in the sum of \$1,211.43, which apparently equals the amount paid by the plaintiff on the contract including interest from the date of the filing of the complaint.

The argument of appellant appears to be based upon the theory that the defendant is a Building and Loan Association and that this is a case of withdrawal, but if it is, there is nothing in the contract or the record which so indicates. The defendant is a Colorado corporation.

"That all associations organized under the general incorporation laws of this state, for the purpose of the accumulation and loan of funds, the erection of buildings, the acquiring of homes, and the purchase, lease and sale of real estate for the mutual benefit of its members, shall be permitted to conduct such business with its members exclusively." 1 Mills Stat., sec. 279.

"The words 'Loan and Building Association,' 'Building Association' or 'Building and Loan Association,' shall form part of the corporate name of every such corporation." 3 Mills Stat., sec. 280.

Beside, provision eleven of "privileges and conditions" expressly recites:

"Eleventh. This bond being the contract between the owner and a corporation, the owner is not liable for any obligations of the company."

This would seem to exclude any possibility of mutual rights, benefits and obligations applicable to the members of a building and loan association made necessary under the statute, although both parties

on the trial seem to have treated the defendant as such.

The proof then having sustained the complaint, we have before us only the legal question as to the sufficiency of these, involved in the refusal of the court to grant a non-suit.

It is urged by appellant that before plaintiff can recover he must show that there are funds in the hands of the defendant which can lawfully be applied to the making of a loan.

Many cases are cited in support of this contention but these are all cases between members of building associations themselves in which there were mutual agreements between the members, and where all alike are bound by the by-laws of the societies.

This is not a case involving the question of withdrawal as a member of such an association, but on the contrary involves the question of the surrender of a contract with the company, in which the holder is not shown to have any other interest.

As before recited, in the case at bar it is expressly agreed in the bond that the same is a contract between the holder and the corporation. There is nothing to indicate, either in the bond or the record, that the plaintiff was a member of the association or had any interest in it except as the purchaser and holder of its bond.

Hence the cases cited can have no application.

This is clearly an action for breach of contract in which the plaintiff seeks to recover upon a contract with it to the effect that if plaintiff shall make the agreed payments as therein provided, he may surrender such contract at any time and have the money paid on it, together with interest and profits

applied in the purchase of real estate for sale by the company, subject to its regular selling conditions, and further that at any time after two years, the legal holder of the bond may borrow 75 per cent. of the money paid in by complying with the conditions of the contract.

The evidence shows that the defendant refused to sell the plaintiff real estate, but based such refusal on the statement that it had no real estate that it was in a position to dispose of.

It is not necessary to discuss this alleged breach, for there was a clear breach of that provision of the agreement providing for a loan to plaintiff of 75 per cent. of the money he had paid in. It is contended that the words "may borrow" made this optional with the defendant as to whether or not it should make plaintiff the loan. We do not think so. We regard it as the clear right of the plaintiff under the contract, to borrow this sum of money and the clear obligation of the company to make the loan without any condition.

It was plainly one of the inducements and considerations of the contract and the failure of the defendant to meet its obligation in this respect, was such a breach of the agreement as is actionable.

The judgment is affirmed.

All the judges concurring.

[No. 3516.]

ATCHISON, TOPEKA AND SANTA FE RAILWAY Co. v.
GUMAER.

1. NEGLIGENCE—*Burden of Proof.* Whoever charges negligence has the burden of proof. The mere fact that live stock are killed

by a train, on the tracks of a railroad, raises no inference of negligence in the operation of the train.

2. — *Question for Jury.* In an action for the death of live stock, attributed to negligence in the operation of a railway train, the plaintiff produces sufficient competent evidence to sustain his allegations; the case must be submitted to the jury.

3. *WITNESS—Party Calling May Contradict.* A party calling a witness may not impeach his veracity, but is not precluded from producing other witnesses whose testimony conflicts with or contradicts his.

4. — *False Testimony on One Point,* does not warrant the rejection of the whole of the witness' testimony, uncorroborated, unless the falsehood was deliberate.

5. *INSTRUCTIONS—Objections to.* A general objection to the whole of an instruction will not prevail, where such instruction contains distinct propositions, one of which is sound in law.

Appeal from Fremont District Court. HON. LEE CHAMPION, Judge.

MR. HENRY T. ROGERS, Messrs. ROGERS, ELLIS & JOHNSON, for appellant.

(No appearance for appellee.)

Judgment affirmed.

WALLING, Judge.

This action was brought by appellee to recover damages by reason of the killing and maiming of a number of appellee's cattle, on the track of appellant's railroad, it being alleged that the cattle were so killed and injured in consequence of the negligent operation of one of appellant's trains. The trial was before the court and a jury, and resulted in a verdict for the plaintiff, upon which the court subsequently gave judgment. Appellant's counsel, in their brief, insist that the judgment should be reversed by reason of errors alleged to have occurred in the trial of the cause in these particulars. First, because the

court denied the defendant's motion for a non-suit, at the conclusion of plaintiff's evidence in chief, and refused to direct a verdict in favor of the defendant, upon all of the evidence; and, second, because the court did not instruct the jury as requested in defendant's request numbered seven, but did give instruction No. 11, which was a part of the court's charge. The argument of appellant's brief in support of the objections included under the first head is based upon the one proposition, that there was no evidence of negligence on the part of the defendant to charge it with legal responsibility for the accident, which was the basis of the action. No brief has been filed on behalf of appellee. It is not questioned that twenty-two cattle belonging to the plaintiff were killed and injured by one of appellant's trains, and there is no controversy as to the extent of the damage sustained.

The trial took place about nine years after the event which gave rise to the action. One of the witnesses called by the plaintiff was the engineer, in the employ of the defendant, who had charge of the locomotive of the train by which the cattle were killed and injured, and he gave the following testimony. The train consisted of either two or three cars, besides the engine, and was running eastward, at a speed of twenty-five or twenty-seven miles an hour, at the time of the accident, which occurred at about nine o'clock in the evening of May 24th. Immediately after the engine had rounded a certain curve, the engineer discovered the cattle on the track, those nearest the engine being about thirty-five to forty-five feet distant from the engine, when it was on the straight track immediately east of the curve. He

could not see the cattle sooner, because of the curve in the track, which prevented the headlight from illuminating the track and right of way for any considerable distance. He immediately blew the whistle, and employed every means of stopping the train, and the engine stopped about seventy to seventy-five yards from its position, when the cattle were first in the engineer's view. The first of the animals was struck thirty-five or forty-five feet from the position of the engine when they were first seen by the engineer. After the train was brought to a standstill, the engineer saw a number of the cattle, which had been either killed or injured, lying near the track, along the entire train's length, from about the point at which, as he said, the first was struck. There were also a large number of cattle on the track ahead of the engine, and upon the right of way. That particular train, at the speed at which it was traveling, on a down grade, could have been stopped ordinarily within a distance of seventy to seventy-five yards, and it was so stopped, after the engineer first saw the cattle.

From this brief statement of the testimony of the engineer, Williams, it is certain that, so far from sustaining the plaintiff's contention that the cattle were killed and injured through the negligence of the defendant, it indicated care and caution in the operation of the train, under the circumstances detailed by him. There is no doubt, moreover, that the burden was on the plaintiff to prove that the loss sustained was the result of the defendant's negligence, and, failing in such proof, she was without a cause of action. This burden was not shifted by mere proof that plaintiff's cattle were killed and injured by the

defendant's train. *Chicago etc. Co. v. Church*, 49 Colo., 582.

But the question whether the issue of negligence ought to have been submitted to the jury did not necessarily depend upon the testimony of a single witness and its accompanying inferences. The plaintiff, having offered the engineer as her witness, could not impeach his veracity; nevertheless, she was not precluded from producing other witnesses in support of her case, whose testimony conflicted with his in certain essential particulars. *Pacific etc. Co. v. Van Fleet*, 47 Colo., 401. It was the just conclusion from the engineer's testimony, that the train was brought to a stop at practically the earliest possible moment, after the cattle could have been seen by him by the exercise of any reasonable degree of diligence. At the same time, the conclusion was inseparable from the facts, as stated by him, among others, that he first saw the cattle immediately after the engine had passed the curve, and that he stopped the train within approximately seventy-five yards of the position of the engine when they were so discovered. If there was other testimony before the jury, which tended to establish a different condition of facts, leading to an opposite conclusion, and from which the jury might reasonably have inferred that the accident could have been prevented by ordinary care on the part of defendant's employees, it was proper to leave the determination of the facts, as well as the just inferences from the facts found, to the consideration of the jury.

"When the facts, or the inferences to be drawn therefrom, are in any substantial degree doubtful, or fair-minded men might reach different conclu-

sions from the facts, the only proper rule is to submit the question to the jury for determination." *Denver etc. Co. v. Wright*, 47 Colo., 366.

Other witnesses on behalf of the plaintiff, one of whom was the plaintiff's husband, and another an employee in charge of the farm whereon the cattle were pastured, were at the scene of the accident on the morning after it occurred, and they testified to the effect as next hereafter stated. Between 1,100 and 1,500 feet from the most easterly point of the curve mentioned in the engineer's testimony, twenty-two head of plaintiff's cattle were found on the defendant company's right of way, four or five of them dead, and eight or nine so badly crippled and maimed, that they were of necessity forthwith killed by the railway company's employees. Nine others were more or less seriously injured. The thirteen cattle, killed by the train and the defendant's section men, were found, according to the statements of plaintiff's witnesses last mentioned, strewn along the track, between points eleven hundred feet and fifteen hundred feet east of the most easterly point of the curve. The distance from the curve to the nearest animal was stated to have been about eleven hundred feet, by one, and twelve hundred feet, by others. They agreed that the one found farthest east was about fifteen hundred feet from the curve—the distances in all cases being approximations of the witnesses, not verified by actual measurements. One of these witnesses testified that, where the dead and maimed cattle were found, there was much hair and blood on the track, and other marks on the ground, indicating that the cattle had been there struck and dragged along by the train. He said that

these physical indications were upon and near the track, commencing about eleven hundred feet, and extending to a point about fifteen hundred feet, east of the east end of the curve. The defendant called as a witness the section foreman, who had arrived at the place where the cattle were found, earlier than plaintiff's witnesses mentioned, and who described the general situation and condition of the dead and maimed animals, without substantial variance from the statements of plaintiff's witnesses, except that the foreman declared that the animals, found dead, or in such condition that they must be killed, were strewn along near the track, between two hundred and fifty and five hundred feet distant from the east point of the curve. The proof showed that the track was perfectly straight for the distance of more than fifteen hundred feet east of the east point of the curve. There was other evidence, having greater or less materiality to the issue of the alleged negligence of the defendant, which will not be discussed, for the obvious reason that it is not our province to pass upon the weight of the evidence.

It can scarcely be questioned that the circumstances detailed in the testimony of plaintiff's witnesses, who were at the locality of the accident on the morning after it occurred, were inconsistent with the testimony of the engineer, that the first of the cattle was struck at a point approximately forty-five feet east of the position of the engine when it completely rounded the curve, and the remainder at intervals of a few feet, until the train was stopped, whether it was stopped within the distance of seventy-five or one hundred yards. There was testimony to the effect that the train could have been brought to a full

stop within the distances last mentioned. It may be remarked here that the testimony of the section foreman, as to the places where the cattle were found on the morning after the accident, while far from agreeing with that of the plaintiff's witnesses to the same point, had no tendency whatever to corroborate the engineer's recollection of the locality of the accident with reference to the curve in the track; and that appears to be true generally of the testimony introduced by the defendant bearing on that subject. The conflict in the evidence above referred to involved not only a matter of fact, but also the legitimate inference to be drawn from the circumstances of the accident.

That these cattle were killed and injured by the engineer Williams' train was sufficiently established by proof, and that fact does not appear to be controverted. Beyond that, there was evidence from which the jury might have found that they were struck at a place where the track was perfectly straight for many hundred feet east of the approaching train, and in circumstances justifying the inference that they could, by the exercise of ordinary care, have been discovered in time to prevent the accident by stopping the train, and we must presume from the verdict that they so found. Our conclusion is that there was competent evidence before the jury, which required the submission of the issue of negligence to their determination. *Railway Co. v. Charles*, 36 Colo., 221; *Railway Co. v. Boyd*, 44 Colo., 119.

The defendant requested the court to give the following instruction:

“Instruction No. 7, requested by defendant.

The jury are instructed that, if they believe that

any witness has wilfully testified falsely as to any material point in the case, they are at liberty to disregard his entire testimony, except insofar as it is corroborated by other witnesses, or by facts or circumstances proved in the trial."

This annotation was made upon the written request, and signed by the trial judge: "Amplified and given as amplified." The bill of exceptions recites: "Said instruction was amplified and given as amplified, and to the refusal of the court to give said instruction number seven requested by defendant in the form as requested, defendant then and there by its counsel duly objected and excepted." Instruction 11, given by the court to the jury, contained several distinct propositions. The first was that the jury were the sole judges of the credibility of the witnesses. Following that, the jury were told that in determining the weight to be given to the testimony of any witness, they had a right to consider his interest in the result, his relation to or connection with the party for whom he testified, etc. The last part of the instruction was in this language: "And if you believe that any witness has sworn falsely to any material matter in the case, then you are at liberty to disregard the entire testimony of such witness, except insofar as the same shall be corroborated by the testimony of other credible witness or witnesses." A general exception was noted by defendant to the giving of instruction 11. It is not claimed that any of the propositions included in that instruction were incorrect, except the sentence last above quoted. Consequently, by the well settled rule, that particular statement cannot be reviewed upon the general exception to the entire instruction.

“Unless, in an appropriate way, an exception to an instruction is made in the court below, so that its attention is directed to the error of law complained of, the instruction will not be considered on review. This court will not review instructions which the trial court was not given an opportunity to correct.” *National Fuel Co. v. Green*, 50 Colo., 307, 324. Also *Beals v. Cone*, 27 Colo., 473; *City of Pueblo v. Timbers*, 31 Colo., 215; *Hasse v. Herring*, 36 Colo., 383. It is true that the last sentence of instruction 11, as given, stated the law incorrectly, and that defendant’s requested instruction numbered seven was right, and should have been given. Of course, the trouble with the instruction given was that the jury were told that, if they believed that a witness had sworn falsely to any material matter of fact, they were at liberty to disregard the entire testimony of the witness, except so far as corroborated, without reference to whether or not the false swearing was intentional or corrupt. *Gottlieb v. Hartman*, 3 Colo., 53; *Last Chance M. & M. Co. v. Ames*, 23 Colo., 167, 172; *Ward v. Ward*, 25 Colo., 33, 39.

The court did not refuse to give the instruction as requested by the defendant, but, on the contrary, evidently intended to make it a part of the general instruction touching the credibility of witnesses. There is no reason to suppose that he deliberately misled the jury, in the face of numerous decisions of the supreme court announcing the correct rule, or that he would have declined to insert the omitted word “wilfully” in the last sentence of the instruction given, if his attention had been called to the omission. In the circumstances presented, we think that it was the duty of the defendant to specially di-

rect the attention of the court to the error in the form of the instruction given, and as it does not appear that that was done, the appellant is not in a position to insist upon its exception based on the failure to give its requested instruction, in the language of the request. This conclusion is the more satisfactory, because there is little reason to suppose that the defendant was prejudiced by the failure to give the instruction requested, in addition to instruction 11, no available exception having been taken to the latter.

There are no other matters urged by counsel for the reversal of the judgment, and it is affirmed.

Affirmed.

[No. 3554.]

McARTHUR v. BRIGHAM.

EXECUTORS AND ADMINISTRATORS--*Right to Control Litigation.* The personal representative to a decedent, who in that capacity has instituted a litigation, is not to be interfered with therein, by the heirs of the decedent, unless some sufficient cause for such interference is shown.

Appeal from Arapahoe District Court. HON.
CHARLES MCCALL, Judge.

MESSRS. CRUMP & ALLEN, Mr. J. E. MCCALL, for appellant.

MESSRS. STUART & MURRAY, for appellee.

On motion to dismiss appeal, JOHN T. BARNETT, Protestant.

Per curiam.

Appellant moves to dismiss the appeal. Against granting said motion protest is filed by an attorney representing some of the heirs of the estate, for which, appellant is administratrix *de bonis non*. The protest is not supported by any showing sufficient to justify a denial of the right of the administratrix to control this litigation. The protest is overruled and the motion to dismiss the appeal is granted.

[No. 3572.]

BURNHAM ET AL. V. GRANT ET AL.

1. *APPEALS—Freehold Involved—Remand.* An appeal from the district court, in a will contest, was transferred from the supreme court to this court. On motion to remand it appeared that substantially all the property of the testator consisted of an interest in the unsettled estate of a brother. Inasmuch as it did not appear that the estate of the deceased brother was solvent, nor but that resort to his realty might be necessary to discharge his liabilities, so that no share of the land of the deceased brother would ever pass to the testator, or those claiming under him, it was held that a freehold was not necessarily involved.

2. — *Amount in Controversy.* On motion to remand an appeal transferred from the supreme court to this court, the reason assigned being that the judgment amounts to more than \$5,000 exclusive of costs, the record presented no finding of the value involved, nor any testimony upon the point save the opinion of one witness, not supported by satisfactory reasons. The motion was denied and the court expressed the opinion that whoever would claim a right or benefit dependent entirely upon the values involved must see to it that the trial court makes a specific finding, and renders a judgment accordingly.

3. — That the clerk of the court of appeals is one of the appellees and the presiding judge one of the attorneys for the appellees is no ground to remand the appeal.

Appeal from Teller District Court. HON. W. S. MORRIS, Judge.

Motion to remand denied.

MR. WILLIAM C. ROBINSON, for appellant.

MR. HORACE N. HAWKINS, MR. GUY P. NEVITT,
for appellees.

CUNNINGHAM, Judge.

Appellants have filed their motion to remand this cause to the supreme court upon the following grounds:

First. That a decision in said cause necessarily involves and relates to a freehold.

Second. That the judgment in said cause amounts to and in effect is a judgment for more than \$5,000 exclusive of costs.

Third. That A. W. Grant, one of the appellees, is the clerk of this court.

Fourth. That the Honorable Tully Scott, the presiding judge of this court, is one of the attorneys for the appellees in this cause.

1. A proper determination of the first and second grounds of the motion requires a brief statement of the case. Frank J. Burnham died, leaving an instrument purporting to be his last will. Substantially all of the decedent's property consisted of a one-third interest which, as heir at law, he had in the unsettled estate of his brother Thomas. The estate of his brother Thomas consisted largely of land, and for this reason the appellants insist that a freehold is involved. The action here involves the validity of the will of Frank J. Burnham, which was called in question by the appellants who contended that he was not of sound mind at the time the will was executed. The appellants are brother and sister of Frank J. Burn-

ham. The sole legatee under the will of Frank J. Burnham bears no relation to him. Both the county and district courts found the testator to be of sound mind, and therefore upheld the will. The disposition of the case in this court will not necessarily take the title of the land belonging to the estate of Thomas Burnham from one of the litigants and vest it in the other. Indeed, various things may transpire during the course of the settlement of either one or both of the Burnham estates whereby not only will no real estate pass to the legatee under the Frank Burnham will, if the same be upheld, or to the heirs at law, if it shall be determined by this court to be a void instrument, but no cash or property of any sort may be left for distribution. For instance, it may become necessary to sell the real estate in order to pay debts, or it may be found impossible or impracticable to make distribution in kind, in which event the real estate would be sold and distribution, if any there be, be made in cash. Counsel for appellants says in his brief that, "the record shows that the only unpaid claim against the estate of Thomas H. Burnham is a claim of this same Frank J. Burnham, and that the estate is entirely solvent, so that the record shows that the title to the real estate of Thomas H. Burnham which vested in Frank J. Burnham is good." Counsel does not call our attention, either in his opening brief or in his reply brief, to that portion of the record which supports the statement we have just quoted from his brief. It is true that the only claim against the Thomas Burnham estate referred to in the record is the claim of Frank Burnham. But we are not able to find in the record anything stating that this is the only claim against the Thomas Burn-

ham estate. On the contrary, we do find, at folio 1326-7 of the record, that one Craft was still pressing a claim which he held against the Thomas Burnham estate, and apparently threatening to bring suit upon it.

2. The evidence as to the value of the estate of Frank J. Burnham is not explicit or satisfactory. Only one witness gave testimony on this point, fixing the value, in his judgment, at approximately \$10,000, but this valuation the witness testified was based upon an offer that had been made for the land belonging to the estate of Thomas Burnham. When the offer was made does not appear, nor do we know whether it was made by a responsible party. Moreover, there is nothing in the record to indicate what claims there may be against the estate of either Thomas or Frank Burnham, or what the cost of administering these estates will amount to. Hence it cannot be determined from the record before us whether a dollar will ever pass to the legatee or to the heirs at law. All the evidence we have on the subject is that the approximate gross value of the property that would come from Thomas Burnham's estate to Frank J. Burnham's estate is \$10,000. Even this does not appear by the pleadings and only crops out incidentally as the judgment or opinion of one witness. The trial court made no finding whatever on the subject, and for this reason I think the judgment is not one covered by section six of the act of 1911 creating this court. *Conly v. Boyvine*, 25 Colo., 499. *Bank v. Follette*, 27 Colo., 512.

In the *Conly* case it is said:

"The parties themselves, neither in their pleadings nor by stipulation, can fix the value of the prop-

erty in controversy, so as to confer appellate jurisdiction."

In *Fischer v. Hanna*, 21 Colo., 13, the supreme court indicates, at least, that under the statute regulating appeals, which is very similar to section 6, a money judgment is contemplated, for the court says:

"Counsel for appellants recognize that a money judgment against the parties appealing was essential," etc.

See also 2 Cyc., 543-4.

Also *Nisbet et al. v. The Seigel-Campion Live Stock Co.*, No. 7807, decided by the supreme court during the present month. The evidence, unsupported by pleadings, or any judgment of the court, is not the correct test of the amount involved. *Kane v. Kane's Admr.*, 48 S. W., 446.

"Generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained, the appeal will be dismissed, and the burden is upon appellant to establish the jurisdiction. Mere uncertain inferences or speculations is not sufficient." 2 Cyc., 555. *Crum v. Pump & Lumber Co.*, 72 N. E., 588.

Under the authorities cited we think that not only is the burden upon the appellant, or the one claiming some right or benefit which must be determined entirely by the size and character of the judgment, to establish that the judgment is of the character and amount necessary to confer upon him the right or privilege for which he contends, but he must also see to it that the trial court makes a specific finding and renders judgment or enters a decree thereon to that effect. The mere impression of a witness that there is \$5,000 involved falls far short

of a judgment, which is the only thing we may properly consider.

3. If we knew of any authority that would warrant this court in remanding the cause to the supreme court for the reasons set forth in the third and four grounds of the motion, or either of them, we should promptly avail ourselves of the same and grant the motion, but no such authority has been called to our attention. The motion to remand must therefore be denied.

Motion to remand denied.

SCOTT, Presiding Judge, not participating.

[No. 3340.]

HERR V. GRADEN.

1. **APPEAL—Law of Case.** The opinion announced upon the first appeal, the facts being the same upon a second trial, is the law of the case upon a second appeal.

2. **TAX TITLES—Advertisement of Sale—Affidavit of Publication.** An affidavit of the publication of the notice of a tax sale conforming to the statute, is sufficient in form.

3. ——— **Who May Verify.** The foreman of the publisher of a newspaper, in general charge of only the mechanical department, and whose duties extend merely to the insertion of advertisements, the manner in which they shall appear, the correct printing thereof, and the mailing of the paper to subscribers, but who is never in supervisory control of the paper, or its policy, is not the "printer" within the meaning of the statute (Mills Stat., sec. 3884; Rev. Stat., sec. 5709). His affidavit is not to be accepted as evidence of the publication of the notice of a tax sale.

The affidavit, as to its authentication, must conform to the statute in force at the date of the sale.

Where at the date of the sale, the statute requires the affidavit to be made by a person designated, and transmitted to the treasurer immediately after the sale, an affidavit made by a different person, years afterward, under authority of a different and more favorable statute, will not be accepted.

4. *STATUTES—Construed.* The manifest purpose of the legislature in secs. 3884, 3885, Mills Stat. (Rev. Stat., secs. 5708, 5709), was that the affidavits there required, deposited with the county clerk, should be a permanent and enduring record of the fact of the publication of the notice of the tax sale; that the affidavit of publication should be made by some person having a proprietary interest in the paper, and in the general control thereof, and of its policy. The words "printer" and "publisher" manifest this intent, and a mere salaried employee, like a typesetter or foreman, is not within the meaning of the statute.

5. — *Saving Clause.* In view of the saving clause in the Revenue Act of 1902 (Laws 1902, c. 3, sec. 237; Rev. Stat., sec. 5785), the amendment to the previous statute (Mills' Stat., sec. 3884) affected by sec. 160 of that amendment, is without effect as to a sale made prior to its enactment.

Appeal from La Plata District Court. CHARLES A. PIKE, Judge.

MESSRS. PERKINS & MAIN, for appellant.

Mr. REECE McCLOSKEY, for appellee.

HURLBUT, J.

Suit by appellee (plaintiff below) against appellant (defendant below) to cancel a tax deed.

Complaint is in usual form and was filed May 12, 1902. The complaint alleges many reasons why the tax deed is void, only two of which it is necessary to mention; viz, (a) That the tax deed is void on its face, (b) That no sufficient publisher's affidavit was executed and deposited with the county clerk and recorder as required by sec. 3884 and sec. 3885, Mills' Annotated Statutes.

This case was tried once before in the district court of La Plata county in 1903. From a judgment rendered in favor of plaintiff an appeal was taken to the supreme court, and the judgment was reversed.

It is now in this court on appeal from a second judgment in favor of plaintiff.

The controversy seems to revolve around the two questions above mentioned, which we will take up in the order stated.

The former opinion in this case, viz., *Herr v. Graden*, 33 Colo., 527, was rendered in 1905. The court there held that the tax deed before it (being the same one now under consideration) was good on its face. Counsel for appellee contends that in a later case, *Lines v. Diggles*, 43 Colo., 166, the supreme court reached a different conclusion in passing upon the validity of a tax deed substantially in the form of the one considered in the former case and involved here. Even if it be true that there is an apparent conflict in the two causes, the situation is controlled by the doctrine of the "Law of the Case," which has been thoroughly considered and settled by our supreme court.

In *Lee v. Stahl*, 13 Colo., 174, the court, in refusing to reconsider certain questions decided on a former appeal of the case, used the following language: "When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on a re-trial of the same case upon the same state of facts, is higher authority than the rule of *stare decisis*. It is generally regarded as *res judicata* so far as the particular question is concerned." This case is cited and approved in *Routt v. Greenwood Cemetery Company*, 18 Colo., 132, and Justice Goddard, speaking for the court, used the following language: "The right of the petitioner to avail itself of the law of 1891, and make full payment or tender of the balance of the purchase price, is not open for discussion on this ap-

peal. On the former hearing that question was passed upon and settled, and is now the law of this case." The following cases also follow the doctrine announced in *Lee v. Stahl, supra*: *Boettcher v. Colo. National Bank*, 15 Colo., 16. *Israel v. Arthur*, 18 Colo., 158. *Wilson v. Bates*, 21 Colo., 115. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 517. *Gutshall v. Cooper*, 48 Colo., 160. *Koll v. Bush*, 6 Colo. C. A., 294. *U. P. Ry. Co. v. Kelley*, 4 Colo. C. A., 325. *Miller v. Hall*, 14 Colo., C. A., 367. *Schmidt & Ziegler v. First National Bank of Denver*, 10 Colo. C. A., 261. *Great Plains Water Co. v. Lamar Canal Co. et al.*, 31 Colo., 96.

The cases of our appellate courts above cited are in line with the great weight of authority in this country.

The record shows that the tax deed which was considered by the supreme court on the former appeal is the same tax deed which was in evidence at the re-trial and which is now under consideration on this appeal. There can be no question but that the facts concerning the form of the deed were the same at the first and second trial of the case, as well as on the first and second appeal thereof. It, therefore, follows as a corollary that the doctrine announced in *Lee v. Stahl, supra*, controls here, and that the tax deed before us must be considered good on its face in conformity with the ruling in *Herr v. Graden, supra*.

In the following cited cases the doctrine of the "Law of the Case" was uniformly adhered to, and in most of them the same situation existed as exists in the case at bar, that is to say, the first appeal was decided by the supreme court and the second appeal by

a different appellate court; viz., *Tipton County Commissioners v. Indiana P. C. R. Co.*, 89 Ind., 101. *Phoenix Insurance Co. v. Pickel*, 3 Ind. App., 332. *Brown v. Marion National Bank*, 18 Ky., 186. *Thompson's Appeal v. Albert*, 15 Md., 268. *Ogle v. Turpin*, 8 Ill. App., 453.

The supreme court on the former appeal of this case having held this same tax deed to be good on its face, the question is *res judicata* as to the parties to this suit, and cannot again be called in question or discussed and considered on this appeal.

The next question for consideration concerns the sufficiency of the publisher's affidavit of notice of tax sale, and as to whether or not the same was executed and deposited with the clerk and recorder as required by law.

At the first trial such affidavit could not be found in the clerk's office, and the trial court refused to permit defendant to introduce evidence showing, as a matter of fact, that such affidavit had been deposited with the clerk about the time of the advertisement of sale. This ruling of the court was held to be error by the supreme court, and the judgment was reversed. At the re-trial of the case defendant failed to show that such affidavit had been filed with the county clerk at or about the time of publication of the tax sale notice. He did show, however, by competent evidence, that on May 31, 1905, an affidavit of publication was deposited in the office of said clerk; that the same was executed by W. S. Dornblaser, the foreman in charge of the mechanical department of the paper publishing the notice. Does this affidavit satisfy the requirements of the statute? If answered in the affirmative, the judgment should be reversed;

otherwise affirmed. The fact that the affidavit was deposited with the clerk many years after publication of the notice of sale, and after delivery of the tax deed to the purchaser, and the fact that it was made after the trial of the case had begun, would be no objection to its admission in evidence, provided it was otherwise sufficient as to contents and execution. In *Bertha Gold M. & M. Co. v. Burr*, 31 Colo., 264, the court held that the failure to file such affidavit would not invalidate a tax sale, and that the fact that the same was not on file with the clerk at the time the tax deed was given was immaterial, if the affidavit be on file at the time it became necessary to prove the fact of publication of notice, and further held that a publisher's affidavit filed after suit brought, and proven at the trial, was sufficient in law as to the time of filing the same. To the same effect is *Sternberger v. Moffat*, 44 Colo., 520, in which case the court held that the affidavit might be filed at any time during the trial of the action to cancel the tax deed, and permitted a second affidavit of like import to be filed in lieu of a former one deemed defective.

When the affidavit of Dornblaser was offered in evidence objection was made, and the court held it inadmissible on the ground that it was not sufficient in form and was not executed by a person qualified under the law to make the same.

We think the affidavit was sufficient as to form. The legislature prescribed a form of affidavit which might be used by the printer. When the prescribed form was used (as was done in this case) it included all allegations which the legislature deemed necessary for the purpose.

A much more serious question presents itself in

considering the sufficiency of this affidavit, namely, was the affidavit executed by the person whom the legislature required should make the same? The answer to this question necessitates a construction of sec. 3884, Mills' Annotated Statutes, which reads as follows:

"Sec. 3884 (Publisher's Certificate—Affidavit—Form). Every printer who shall publish such list and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county, an affidavit of such publication, made by such person to whom the fact of publication shall be known; and no printer shall be paid for such publication who shall fail to transmit such affidavit within fourteen days after the last publication. Such affidavit may be substantially in the following form, to-wit:

I, A. B., publisher (or printer) of the., a newspaper, printed and published in the county of., and state of Colorado, do hereby certify that the foregoing notice and list were published in said newspaper, once in each week, for. successive weeks, the last of which publication was made prior to the. day of., A. D., and that copies of each number of said paper, in which said notice and list were published, were delivered by carriers or transmitted by mail to each of the subscribers of said paper, according to the accustomed mode of business in this office.

A. B.,

Publisher (or printer) of the.

STATE OF COLORADO,
..... County—ss.

turn are held to indicate interest or rights of some character in connection with ownership or title to the plant.

In *Pennoyer v. Neff*, 95 U. S., 714, in passing upon an Oregon statute requiring proof of publication of summons to be made by the "printer or his foreman or his chief clerk," it was held that the word "printer" as used in the statute did not mean the person who sets up the type, but was used as synonymous with "publisher." It was also held that the statute was satisfied if the "editor" made the affidavit. To the same effect is *Bunce v. Reed*, 16 Barbour (N. Y.), 347. The court had under consideration the same kind of a statute as that of Oregon, and it was held that in the affidavit which mentioned the affiant as the "publisher" of the paper, the word was synonymous with the word "printer" as used in the statute. Also in *Sharp v. Daughney*, 33 Calif., 505, the court, in construing a statute similar to that of Oregon, construed the words "publisher" and "proprietor" as being synonymous, and meaning the same thing as "printer." To the same effect is *Woodward v. Brown*, 119 Calif., 293. In the case of *Brown v. Woods' Heirs*, 29 Ky., 6 (J. J. Marsh), 11, the court, in construing a statute requiring the "printer" to certify to the orders of publication, held that the term "printer" meant not one who merely performed the mechanical process of printing, but one who had an interest, as one owning the paper in which the order was published, and held that the certificate of the "editor" was not a compliance with the statute and therefore insufficient. The court says: "The language of the legislature requires something more than the certificate of the 'printer.' If it did not, an

apprentice, a journeyman, or even a slave, might, by his certificate, furnish the requisite proof, for all these might be 'printers' in the strict sense of the term. The act only gives validity to the certificate of the 'printer in whose paper the order shall have been published.' " In *Latham v. Roach*, 72 Ill., 179, a proprietor is defined as "an owner, a person who has legal right and exclusive title to anything, whether in possession or not."

In the light of these decisions it may be asked what is the legislative meaning as expressed in the first few lines of the act? viz, "Every printer who shall publish such list * * * shall * * * transmit to the treasurer of the proper county an affidavit of such publication, made by such person to whom the fact of publication shall be known. * * *". It will be noticed that the act does not require the printer who published the list to *make* the affidavit. But it requires that he transmit to the treasurer *an* affidavit of such publication "made by *such person* to whom the fact of publication shall be known." Does the phrase "such person" refer to the "owner," "publisher" or "proprietor," or some one of them, or does it mean as well any type-setter, foreman, pressman, or apprentice of the paper?

Sec. 3885, Mills' Annotated Statutes, required this publisher's affidavit, together with the treasurer's affidavit, to be deposited with the county clerk and recorder and carefully preserved in his office. We think this section manifests a legislative intent that these affidavits should become a permanent, enduring record of the fact of publication of the tax list. It is common knowledge that the incumbents of the office of clerk and recorder are constantly chang-

ing. As a general rule a few years, at the most, marks the period of occupancy of that office by the same person, while the affidavits which are preserved in his office remain, silent unchanging witnesses of the fact of publication. It would appear to be a wise provision of the law that such affidavits are required to be so deposited and preserved, it being a more reliable grade of proof than that depending upon the evidence of living witnesses having knowledge of such publication, whose testimony, however, may or may not be obtainable when needed; and it might be said to be an equally wise provision of the law which prescribes a form of affidavit to be used by the printer who publishes the list, as tending to uniformity in the contents of the affidavits constituting the record of publication. We think it apparent from the act that the legislature intended the affidavit of publication to be executed by some person connected with the ownership and general control and management of the paper, and its policy, and used the words "printer" and "publisher" to manifest such intent. It does not seem reasonable that the term "printer," as here used, could have been intended to be synonymous with type-setter, foreman, pressman, apprentice, or other salaried employee of the printing plant. Such employees are constantly coming and going, have no interest in the financial success of the paper, and have no ties to bind them to its continuance, save only the amount of remuneration they receive for their labor. They are ready at any time on short notice to terminate their employment upon offer of greater compensation or more agreeable surroundings. On the other hand the proprietor or publisher is generally compelled to remain with the paper for

substantial periods of time, owing to his interest and investment in the same. In fine, if the legislature had intended that so important an affidavit should be made by a foreman, type-setter, apprentice or other salaried employee of the paper, it would have indicated the same by the use of some phrase or term other than the one used in the act.

The wording of sec. 3884 of the statute further confirms the view which we take as to the sense in which the word "printer" is used. The section in question provides, among other things, that "no printer shall be paid for such publication * * * unless," etc. Clearly it was the purpose of the legislature to impose a penalty on the "printer" for the purpose of insuring the filing of the important document, to-wit, the affidavit. Dornblaser worked for a salary; *he* was not to be paid for the publication, presumably. Any failure to pay for the publication by the county could not penalize *him*. Again, the first sentence of sec. 3884 refers to "Every printer *who shall publish such list*," etc. Now the printer who "publishes the list" must be the printer who publishes the paper in which the list appears. It cannot be possible that a paper should have two distinct publishers at the same time. The foreman on a salary is not the publisher; if he is, then we would have the anomalous situation of an owner and proprietor of a paper having charge of its general policy who was not its publisher, a situation that has come to be possible in the east in large cities and on large publications, but which we apprehend no one will contend applies to the conditions that prevailed in the office of the newspaper in which appeared the affidavit under consideration.

Upon consideration of the act itself, and the reasons for its enactment, we have reached the conclusion that the terms "printer" and "publisher" as used in the act refer to a person having some title or proprietary interest in the paper or plant. Therefore a mere salaried employee of the paper or plant, such as foreman or type-setter, is not authorized to make such affidavit. For the reasons given we think the affidavit under consideration does not satisfy the statute and the trial court properly ruled against its admission in evidence.

Some other assignments of error have been argued by counsel, but we deem it unnecessary to further prolong this opinion by discussing them.

Observing no reversible error in the record, the judgment will be affirmed.

Judgment Affirmed.

On rehearing.

HURLBUT, J.

We have again reviewed the record, briefs, and authorities cited, in this case, and are not convinced that this court committed any error in affirming the judgment below, and are satisfied with the authorities therein cited and the reasoning upon which the opinion is based.

Upon the oral argument had after the petition for rehearing had been granted, appellant for the first time strongly contends that under the act of 1902, which became operative March 22nd of that year, the affidavit of publication of Dornblaser was in every way in conformity with that act, and that inasmuch as this suit was begun after that act went into effect the court below erred in excluding said affidavit from evidence.

It appears that sec. 160 of said act of 1902 repealed sec. 3884, Mills' Annotated Statutes, in one important particular, namely, it provides:

"Every publisher or printer who shall publish such list and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication made by such publisher, printer, *or some other person to whom the fact of publication shall be known.* * * *"

Whether the law-making body changed said sec. 3884 because they considered that section as only authorizing the printer or publisher to make said affidavit, or whether they considered that part of said section as ambiguous and uncertain, is immaterial and unnecessary to consider, in view of the conclusions we have reached. We do not think appellant can invoke the benefits of that part of the act of 1902 above quoted, because of the saving clause, sec. 237 found therein, which reads as follows:

"Nothing in this act shall be held to apply to, or in any manner affect, any assessment, levy, tax certificate, tax sale, tax deed, tax warrant, suit, lien, claim, demand, vested right, indictment, information, prosecution, trial, writ, warrant, writ of error, appeal, judgment, sentence or other proceedings, in any cause now pending in any courts of this state, had, brought, or to be brought under the provision of any law repealed by this act upon anything prior to the repeal of said acts or parts of acts hereby repealed, but the same shall be held, conducted, inquired of, prosecuted, litigated, adjudged and determined as provided for by the laws in force before and at the time this act takes effect."

It will be observed that the tax deed involved in

this controversy was executed, delivered and recorded prior to the time of the passage of the act of 1902, and the levy, assessment, tax sale, and other proceedings and acts of the revenue officers, upon which said deed was founded, were all had and done prior to that time. In order that said deed could be considered as a valid conveyance of the property therein described, it was essential that, when its validity was challenged in the court below by appellee for the reason that no proper affidavit of publication of the notice of tax sale upon which it was founded had been executed and transmitted to the treasurer of the county, and that no such affidavit had ever been deposited by him with the county clerk of the county, the record should show the existence of such affidavit prior to, or at the time of the trial, and that it was, or had been, in the custody of the county clerk and recorder. The only kind of an affidavit of publication which would support this deed would be such as was required under the terms of said sec. 3884, which was the only statute in existence at the time the deed was executed and recorded, and the various proceedings were had which culminated in its issue.

We do not overlook the decisions of our supreme court which have held that it is sufficient if such affidavit has been made and filed with the county clerk at any time subsequent to the publication of the notice of sale, even though it be not so made and filed until the trial is in progress. But, whatever be the time of its execution and filing, it must be in accordance with the provisions and requirements of the statute in force at the time of the publication of the notice of sale, unless the law provides otherwise.

It appears clear to us that when a title acquired by tax deed is challenged, as shown by the record here, for the want of a sufficient affidavit of publication, the owner must be prepared to show that such affidavit has been executed and filed as required by law, in order to sustain the validity of his title, and that where the law required such affidavit to be transmitted to the treasurer of the county immediately after the publication of notice of sale he may not wait for years thereafter until some more favorable statute shall be passed, under the provisions of which he can readily furnish the affidavit, but which, under the former statute, he could not have furnished at all, or which would have been exceedingly difficult for him to have procured, and more particularly is this true under a saving clause such as was here enacted.

Being satisfied with what has been said by the court in the opinion rendered, and believing that the affidavit of publication was not executed by a person authorized under the provisions of said sec. 3884, the former decision is adhered to.

Decided Jan. 8, 1912. Rehearing granted March 11, A. D. 1912. October 14, 1912, on reargument opinion adhered to.

[No. 3827.]

JEWEL V. SAIS.

1. BILL OF EXCEPTIONS—*Failure of Party to Comply With the Orders of the Court.* Where the defeated party fails to comply with the orders of the court as to the presentation of his bill of exceptions the court of review will not require the judge of the trial court to authenticate such bill of exceptions.
2. APPEALS—*Transcript of Record—Instructions.* Where com-

plaint is made of the denial of instructions all those given must appear in the transcript.

3. — *Defective Transcript—Affirmation of Judgment.* No question being presented which could be considered by the court, the judgment of the trial court was affirmed.

Appeal from Morgan District Court. HON. H. P. BURKE, Judge.

Mr. JAMES E. JEWEL, *Pro se.*

Mr. JOHN H. REDDIN, Messrs. MARRON & WOOD,
for appellee.

On motion to dismiss appeal.

Per Curiam.

Upon a former hearing, and upon motion of appellee, defendant's bill of exceptions was stricken from the files.—*Jewel v. Sais*, 123 Pac., 830. Supplementary proceedings were had in the trial court from which it is made to appear that no bill of exceptions had been settled by the judge of said court, nor presented to him to be settled or signed, and that said court now declines to grant appellant's motion to sign and seal the same.

Appellant, having failed to comply with the rule and order of the court in the matter of presenting and filing his bill of exceptions, his motion for an order of this court commanding the trial judge to sign and seal his alleged bill of exceptions, must be denied.

Appellee renews his motion for an affirmance of the judgment. The assignments of errors on the appeal herein raise no objections that can be considered in the absence of a bill of exceptions, unless it be the errors assigned to the action of the court in

giving instructions to the jury, and in refusing instructions offered by the defendant. Only the instructions offered and refused are preserved in the record as certified to this court. The instructions given are not before us. It is settled law in this jurisdiction that where exception is taken to a refusal to give certain instructions, all instructions actually given must be included in the transcript for review, or the errors assigned cannot be considered. *Tucker v. Parks*, 7 Colo., 62. *McQuown v. Cavanaugh*, 14 Colo., 188. *Bradbury et al v. Butler et al.*, 1 Colo. App., 430, 435.

For the reasons given the judgment appealed from is affirmed.

Decided May 13, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3347.]

KING SOLOMON TUNNEL AND DEVELOPMENT CO. v.
MARY VERNA MINING CO.

1. BILL OF EXCEPTIONS—*Requisites*. A bill of exceptions taken in the trial of a cause which involves a question of boundaries should set forth the plats which were used and referred to in the trial court, even though the ground in contention is fully described by metes and bounds.

2. APPEALS—*Errors Assigned and Not Argued*. The rule that the court will not consider the sufficiency of the evidence where the bill of exceptions omits important documents used at the trial, e. g., plats of the ground in controversy; and the other rule that the court will not consider errors which are not discussed by counsel, are not inflexible. The substantial rights of the parties are not to be sacrificed to the inadvertencies or omissions of counsel.

Error in an instruction highly prejudicial to defendant considered, though counsel had entirely failed to call attention to it.

3. **MINING CLAIMS—Abandonment.** An amended location, the filing of a new location certificate, and the sinking of a new shaft, is not of itself an abandonment of the original location.

4. — *Location—Discovery of Mineral—Evidence.* The question being as to the validity of the location of a lode claim, the opinion of an experienced miner that there was such a showing of vein and mineral in place that a reasonably prudent miner would expend his time in the development of the claim, is competent.

5. **INSTRUCTIONS—Error as to the Law—False Assumption of Fact.** An instruction which announces as the law what is not the law, or which assumes as proven what is not supported by the evidence, or withdraws from the jury an issue of fact exclusively within their province, involves fatal error.

6. **EVIDENCE—Opinions of Witnesses.** In a controversy as to a mining location it is error to receive the opinions of witnesses as to whether the ground was, at the time of the location, vacant and part of the public domain. The question is one for the jury upon evidence as to the actual developments there made.

7. — *Objections to Evidence.* An objection to a question propounded, or evidence offered, should assign a clear and positive statement of the ground of objection.

An objection which fails to assign any ground of objection presents nothing for the consideration of the court of review.

So an objection to a question assigning as ground thereof that it is "incompetent, and calls for a conclusion."

8. **DEED—Mistake in Description.** The deed of a mining claim referring to the location certificate gave an erroneous reference to the place of the record. Held that evidence to explain this mistake should be introduced; though it was held that the admission of the deed without such explanation was not error.

Appeal from Summit District Court. HON. CHARLES CAVENDER, Judge.

Mr. GEORGE S. REDD, Mr. GEORGE STIDGER, for appellant.

Mr. J. T. HOGAN, for appellee.

HURLBUT, J.

This action was begun in the Summit county district court in support of an adverse claim, by

plaintiff below (appellee), against defendant (appellant).

The complaint alleges that on the 17th day of July, 1905, plaintiff was the owner of the Dollie Thompson, Kate Jackson, Tid-a-Wid, and Marguerite lodes; on June 30th, 1905, it was the owner of the Troublesome lode; all located in the Consolidated Ten Mile Mining District in Summit county, Colorado (for brevity these lodes hereinafter will be designated the Dollie Thompson group); that on April 14th, 1906, defendant ousted plaintiff from that part of said lodes in conflict with defendant's Survey Lot No. 17781, A and B, consisting of the Royal King Solomon No. 1, the Royal King Solomon No. 2, the Royal Queen of Sheba, the Royal Queen of Sheba No. 2, the Royal Queen of Sheba No. 3, the Royal Queen of Sheba No. 4, the Royal Queen of Sheba No. 5, the Royal Queen of Sheba No. 6, the Royal Queen of Sheba No. 7, and the Royal Queen of Sheba No. 8 lodes, as shown by exhibit B (hereinafter designated as the King Solomon group). The case was tried to a jury and verdict returned in favor of plaintiff for the ground in conflict. Trial was had December 17th, 1907.

This court would be warranted in refusing to consider any question concerning the rulings of the lower court in admitting or rejecting evidence at the trial, for the reason that none of the plats admitted in evidence have been incorporated in the bill of exceptions. The court has been hampered by not having such plats before it. There were four or five of them, all made from surveys of the ground by competent engineers, and showed the disputed premises in their various phases. It is well known to

the profession that such plats are helpful to the court in this class of cases and enable it to readily understand the situation as to controverted ground. It is true that each lode is fully described by metes and bounds, but in order to understand its relative situation to others, concerning ground in controversy, plats become very helpful. These plat exhibits could have been easily filed as originally admitted, or reduced copies thereof could have been made or photographed for the use of the court. In *Fugate v. Smith*, 4 Colo. C. A. 201, the court refused to decide whether or not the evidence warranted the verdict, for the reason that the plats admitted in evidence were not incorporated into the bill of exceptions. To the same effect is the case of *Diamond Block Coal Co. v. Cuthbertson*, (Ind. C. A.) 67 N. E. 558. The court there held that, notwithstanding the fact that the bill of exceptions recited that it contained all the evidence adduced at the trial, it would not pass on alleged errors in the admission or rejection of evidence, for the reason that plats used at the trial were not preserved in the bill of exceptions. Appellee also invokes the well established general rule that appellate courts will not consider errors assigned but not discussed in the printed briefs or on oral argument. Notwithstanding these general rules, we do not think they are, at all times and under all circumstances, inflexible. The appellate courts may in their discretion, and sometimes do, disregard the same, in order to prevent a miscarriage of justice. *Allen v. Tritch*, 5 Colo. 222; *Grotch v. Kersting*, 23 Colo. 213.

We think the substantial rights of litigants are of greater weight than the inadvertence or omissions

of their attorneys. We are satisfied that the record here justifies the court in considering the same in formulating its opinion, although the rule may have been disregarded by appellant. We will concede that appellant failed, both in its printed brief and on oral argument, to discuss the eighth assignment of error next hereinafter mentioned. This assignment challenges the ruling of the court in giving instruction number eleven to the jury. This was palpable error and highly prejudicial to defendant, and practically instructed it out of court. The instruction reads as follows:

"The court instructs the jury that if you believe from the evidence that the plaintiff and its grantor made valid locations of the Kate Jackson, Dollie Thompson, Tid-a-Wid, Marguerite and Troublesome lode mining claims on the 15th day of July, 1905, or prior thereto, then your verdict will be for the plaintiff for all or such of said claims as you shall find have been properly located, regardless of the locations made by defendant prior to September 12th, 1905; in other words, under the evidence in this case, the defendant, by electing to sink new discovery shafts and filing new location certificates, thereby abandoned all locations made prior to the discovery and location of September 24th, 1905, and are entitled to recover only upon their discovery and locations of that date."

This instruction commands the jury to disregard any and all locations relied upon by defendant if made prior to September 24th, 1905, and further tells them that defendant abandoned all locations made, or relied upon, by it prior to that date, because it had elected to sink new shafts and

file new location certificates, when it made the amended location of September 12th, 1905. The effect of this instruction was to confine defendant's right of recovery to lodes discovered and located on September 12th, 1905, and subsequent thereto. Defendant pleaded title to the disputed ground by discovery and location antedating that of plaintiff by several years. This was denied by plaintiff and became a material issue in the case. If defendant, by evidence, could have satisfied the jury that its discoveries and locations were valid, and prior to those of plaintiff, it would have been entitled to a verdict. That part of the instruction charging the jury that defendant, by electing to sink new shafts on its lodes previously located, and filing new location certificates thereof, thereby abandoned all locations previously made, and could claim no rights under such former locations, is new and novel as a legal proposition. On the contrary, a multitude of cases can be found in the printed reports repudiating that doctrine. "Abandonment is a question of fact, and the fact is to be found from the intention." Morrison, Mining Rights, 14th ed. p. 106, citing many cases. It is a question of fact for the jury. *Marshall v. Harney Peak Co.* (S. D.) 42 N. W. 290; *Taylor v. Middleton*, 67 Calif, 656. It appears from the evidence that defendant sunk new shafts on each of the King Solomon group of lodes when it filed its amended location certificates thereof. However, the sinking of the new shafts and filing of amended location certificates was subsequent to plaintiff's location of the Dolly Thompson group, but each amended location certificate of the King Solomon group clearly stated that it was an amended location of the

lode, under the act of congress approved May 10th, 1872, and § 2409, general laws of Colorado, and that it made such amended location for the purpose of correcting any errors in the original location, and without waiver of any previously acquired rights. In filing these amended location certificates defendant was not required to discover a new vein or lode, sink any additional shaft, or make any new discoveries of mineral thereon. *Becker v. Pugh*, 17 Colo. 243; *Tonopah Co. v. Tonopah Co.*, 125 Fed. 390. The last case cited is an exhaustive and interesting opinion on the subject. If then, in making an amended location of the lodes, it was not necessary for defendant to sink an additional shaft or perform other acts of original discovery and location, it cannot be said that by so doing it abandoned or surrendered any rights previously acquired under the original locations. In this case the question as to whether or not defendant, by itself or grantors, had made valid locations of the King Solomon group of lodes in January, 1903, and had thereafter maintained its possessory right to the same by performing the required annual work, was a sharp and decisive issue in the case, to be determined by the jury. Defendant's evidence tended to show that its grantors and itself had been in possession of the lodes each year from the date of original discovery to the time of trial, and had expended thereon yearly large sums of money in developing and improving the same. These evidential facts, taken in connection with the recitals in the amended location certificates, were clearly pertinent on the question of abandonment and should have been submitted to the jury for their consideration. We have carefully read the abstract

of record, and we fail to find a line, word or syllable, therein, which tends to show an intention on the part of defendant to abandon the original location of any one of the King Solomon group of lodes, unless the mere fact of sinking a new discovery shaft thereon, or filing an amended location certificate thereof, can be so considered. The evidence of defendant's witness Sanderson, a United States Deputy Surveyor employed by defendant to make the alleged amended locations of the King Solomon group, tends clearly to show that in doing so defendant had no intention of abandoning any rights it possessed under the original locations of 1903. We agree with appellee's counsel that in giving an instruction to the jury by a trial judge it is unnecessary for such judge to incorporate therein any reasons to support the same; and we also agree that he may give an arbitrary instruction to the jury to return a verdict for either party, but in either case the instruction will be tested by evidence, proofs and pleadings, as shown by the record, and if the same announces a principal of law which is erroneous, or assumes a fact proven which lacks evidence to sustain it, or by its phraseology withdraws from the consideration of the jury an issue of fact exclusively within their province, then in any or either of such cases an appellate court will not sustain such an instruction. The issue of abandonment was all-important in this case, and the instruction entirely removed it from the consideration of the jury. For the error committed in giving this instruction to the jury the judgment must be reversed.

We are not disposed to consider other questions raised, but as the case will likely be tried again it

may not be amiss to briefly notice one or two other assignments urged by counsel as reversible error. It is insisted by appellant that the court erred in permitting the witnesses Wildhack and Coffelt to testify as to whether or not the located ground was vacant public domain at the time of certain locations. This was clearly prejudicial error, as that question was the ultimate fact upon which the jury were to pass. It cannot be said to be harmless. The questions were directed to a material and sharply contested issue. True, the plaintiff produced other evidence tending to corroborate these witnesses, but the defendant produced evidence strongly tending to disprove the same. There is no guide to inform us as to what weight the jury gave to the conclusions of these two witnesses as against the testimony of defendant's witnesses. When an issue of this character is before the jury for determination we think witnesses should be limited in their testimony to their knowledge of the physical conditions of the ground, based upon personal examination and inspection thereof, what shafts, adits, tunnels, or other mining developments thereon came within their observation, etc. It then becomes the province of the jury, under proper instructions, to determine whether or not the alleged locations were made upon unappropriated public domain. In the case of *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, the following question was propounded and permitted to be answered by the witness, under objection, to wit:

“Q. From your experience as a farmer, and in irrigation in connection with it, is there water enough in that ditch now, or has there ever been for

the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?"

The court held the ruling to be error and assigned the same as one of the reasons for reversing the judgment. To the same effect: *D. & R. G. R. R. Co. v. Scott*, 34 Colo. 100; *Holy Cross Mining Co. v. O'Sullivan*, 27 Colo. 238. There are some exceptions to this rule, viz: *T. & F. W. R. Co. v. Pulaski Ir. Co.*, 10 Colo. 367, and *Sears v. Seattle Con. R. Co.*, 6 Wash. 227. It appears to us however that the question and answer here considered do not fall within the exception. While on this point we might say that as to the witness Wildhack, the only objection to the question propounded was as follows: "Objected to by defendant." "Objection overruled." "Defendant excepts." As to the witness Coffelt, objection was made to the question as "being incompetent and called for a conclusion". The first objection above mentioned, failing to specify the ground thereof, would not be entitled to consideration in this court. The second might be said to be sufficient for consideration on appeal, but we think it lacking as a clear and positive statement of the ground of objection. It has been held time and again by our appellate courts that an objection to the admission of evidence without assigning any reason, or sufficient reason, therefor, does not entitle the party objecting to have the objection considered. *Hindrey v. McPhee*, 11 Colo. C. A. 398; *Armstrong v. Higgins*, 9 Colo. 38.

Error is also predicated upon the court's ruling in permitting the following question and answer to be admitted in evidence on behalf of plaintiff:

"Q. Is that such a showing of a vein and min-

eral in place that a reasonably prudent miner in the district would expend his money and time with expectation of finding ore?

A. There was such a showing as a man would expend his time."

The authorities next hereinafter cited sustain the court's ruling in that behalf: *Eureka Co. v. Richmond Co.*, 4 Sawy. 302; *Shoshone M. Co. v. Rutter*, 87 Fed. 801; *Wilson v. Harnette*, 32 Colo. 172.

The ruling of the court in admitting in evidence the deed to the Troublesome lode from Hopkins to Parker was not error. We think, however, evidence should have been introduced to explain the mistake, if any, as to the location certificate of the property conveyed not being recorded in the book and at the page to which reference is made in the deed.

For the reasons given, the judgment will be reversed and the cause remanded.

Reversed and Remanded.

Decided June 10, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3434.]

EMPIRE RANCH AND CATTLE COMPANY, V.
CHAPIN, ET ALS.

1. PLEADINGS—*Judgment on the Pleadings*. Bill to quiet title. The answer denied both plaintiff's title and possession, and averred that "that whatever estate the defendant hath or asserts is based upon a certain treasurer's deed," alleging diverse fatal defects therein. The replication denied every allegation of the answer except the allegation that plaintiff held the treasurer's deed described. Held that inasmuch as both plaintiff's title and

possession was in issue his motion for judgment upon the pleadings was properly denied.

2. — *Answer—Inconsistent Defenses.* Bill to quiet title. Answer denying both plaintiff's title and possession and containing a cross-complaint alleging that plaintiff asserts title solely under a certain treasurer's deed, setting forth fatal defects therein. The cross-complaint held not inconsistent with the answer.

3. *STATUTE OF LIMITATIONS—Pleading.* Defendant who with full knowledge of all the facts, goes to trial without pleading the statute of limitations, waives the defense. He may not present the defense by a supplemental answer tendered months after the trial.

4. *APPEALS—Presumptions.* Where the evidence produced by the successful party is not preserved in the record its sufficiency will be presumed.

5. *TAX TITLE—Void Deed—Taxes Paid to Be Recovered.* Where on bill to quiet title plaintiff claimed under a void tax deed the amount of taxes paid by him, and the interest and penalties prescribed by the statute should be ascertained by the court, and a decree in favor of defendant should be conditioned upon payment to the plaintiff of the amount so ascertained.

In an appeal from a decree omitting this condition the cause was remanded with directions to the court below to hear evidence, make the computation, and require payment of the amount within thirty days.

Appeal from Denver County Court. HON. GRANT L. HUDSON, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. ISAAC PELTON, for appellee Bell.

CUNNINGHAM, Judge.

Appellant, hereinafter referred to as plaintiff, brought its action under the code to quiet title to certain lands in Arapahoe county, alleging absolute ownership and possession. Appellee Bell, hereinafter referred to as defendant, was permitted to intervene, and by order of court was made a defend-

ant in the case. No appearance was entered by the other defendants. Bell filed his answer and cross-complaint. In his answer he denied plaintiff's ownership and possession; alleged fee simple title and possession in himself, and further alleged that "whatever estate, right, title or claim in or to said lands the plaintiff has or asserts, the same is based upon a certain treasurer's deed of record," giving book and page where the same was recorded. Defendant then proceeded to allege divers fatal defects in said treasurer's deed. In his cross-complaint Bell alleged title and possession in himself to the lands in question, plaintiff's wrongful assertion of title, and asked that his, defendant's title, be quieted as against the claims of plaintiff. Plaintiff replied, denying every allegation of the answer and cross-complaint, except that he admitted he was the holder of a treasurer's deed, and that the same was of record, as alleged. Thus it will be observed that plaintiff denied that his sole claim of title was based on the treasurer's deed.

1. At the trial, on the pleadings thus framed, plaintiff moved for a rule that the defendant held the affirmative and should proceed with his proof, plaintiff's theory being, apparently, that the defendant, by alleging that plaintiff held a tax deed of record, admitted title in it, unless the defects in the tax deed alleged in defendant's answer be established, and that the burden of establishing such defects was upon him who alleged them—the defendant. This motion of plaintiff was denied, and plaintiff was ordered to proceed with its proof, whereupon its counsel announced that, "plaintiff does not care to introduce any evidence, because the

defendant admits all that we can prove, we will, therefore, move the court for judgment'' on the pleadings. Plaintiff's motion for judgment on the pleadings was overruled, and error is assigned to the ruling of the court in this behalf, and constitutes one of the important questions debated in the briefs. We think the action of the trial court in overruling plaintiff's motion for judgment on the pleadings was proper. Nothing contained in defendant's answer admitted plaintiff's possession, and his answer, as we have pointed out, specifically denied that it had either title or possession, and alleged that he, the defendant, had both title and possession. Both parties were before the court, each claiming title and possession to the land, and praying for an adjudication of the title. Under such circumstances it was the manifest duty of the trial court to take the proof and thus determine the controversy. 23 Cyc. 769; 17 Enc. Pl. and Pr. 369; *Chester v. Field*, 87 Calif. 422; *Rice v. Bush*, 16 Colo. 488.

Moreover, defendant's allegation touching plaintiff's treasurer's deed, if a confession of title at all, was avoided by the further allegation of fatal defects in said deed. This last plea, by way of confession and avoidance, if it may be so termed, was not inconsistent with the previous specific denial in the answer of title or possession in the plaintiff, or with the allegation by defendant of both title and possession in himself. Certainly there was not such inconsistency in the answer as is opposed to any authority with which we are familiar.

2. Plaintiff rested without making any offer to introduce its treasurer's deed, or any other muniment of title. To sustain the allegations of his an-

swer and cross-complaint, defendant introduced four exhibits consisting of a patent from the government; a deed of trust from the original patentee; a mortgage bond executed by the patentee, and a trustee's deed running to the said defendant Bell. None of these exhibits were brought up by bill of exceptions or otherwise, hence we must assume they were sufficient to sustain the findings and decree, which were in favor of defendant.

3. More than three months after the date of the trial, and after the motion for a new trial had been denied, plaintiff, by leave of court, filed what it terms an amendment to its answer to defendant's cross-complaint, but which was in reality a supplemental answer, in which supplemental answer plaintiff sought, for the first time by plea, to invoke the provisions of the seven-year statute of limitations embodied in section 4090 R. S.

This amended answer to plaintiff's cross-complaint conclusively shows that every fact therein alleged must have been known to it more than two and one-half months before the case was called for trial. Having proceeded to trial with full knowledge of what the facts were, and without claiming the benefits of the statute, even if same were available and properly plead, it will be held to have waived same. But under the rule announced in *Hughes v. Webster*, 52 Colo. 475, 122 Pac. 789-791, the supplemental plea, even had the same been well pleaded and filed at the earliest possible date after the facts became known to the plaintiff, is insufficient on its face.

4. The decree rendered by the trial court does not provide for the repayment to appellant of the taxes paid out, and penalties incident thereto, nor

is there any finding showing the amount of such taxes and penalties. Appellee insists that the proof was not sufficient to warrant the repayment to appellee of any taxes that it had paid, and points out that a portion of these taxes were paid after the suit had been commenced, and hence was a voluntary payment. The action is, in its nature, distinctly equitable, and under the record before us, we think it was the duty of the trial judge to have ascertained the amount of taxes that had been paid by the appellant, together with the statutory interest and penalties, and to have made the decree which it rendered in favor of the defendant conditioned upon the payment to the plaintiff of the sum thus found due. The case is therefore remanded, with directions to the trial court to take such testimony as may be necessary to determine the amount of taxes that have been paid on the land by appellant, together with the statutory interest and penalties, and if appellee shall, within thirty days from the date of such finding by the trial court, pay the amount thus found due, then the judgment shall stand affirmed. Otherwise it will be reversed.

Remanded with directions.

Decided June 10, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3514.]

DEUTSCH, ET ALS., V. ROHLFING, ET ALS.

1. PLEADING—*Waiver of Demurrer by Amendment.* The amendment of an answer after a demurrer sustained thereto waives any error in the ruling on the demurrer.

2. — *Amendment—Discretion of the Court.* The allowance or rejection of an amendment to the pleadings is ordinarily committed to the sound discretion of the trial court. Where the record fails to show the reasons upon which the court acted in striking out an answer or counterclaim, the propriety of its action will not be reviewed upon appeal.

3. — — *Repetition.* of a pleading already adjudged to be insufficient may be stricken out on motion.

4. *HUSBAND AND WIFE—Right of One Spouse in the Estate of the Other.* Neither spouse has any right, vested or inchoate, in the estate of the other. The husband's consent to the wife's testamentary disposition of her property is effective as against his creditors, and this even though such consent was given with the active purpose to defeat the right which, the husband surviving the wife, the creditors might otherwise have to resort to the husband's moiety of the wife's estate. The creditor has no right to compel the husband to take as against the provisions of the will, and no standing to afterwards question the probate of the will, or the disposition of the wife's property made thereby.

5. *WILLS—Probate—Effect.* The probate of a will relates to the death of the testator, prevents intestacy as to whatever is devised thereby, and is conclusive of the legality and validity of the testament, as against all the world.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. PHILO D. TOLLES and Mr. THOMAS D. COBBEY, for appellants.

MESSRS. BARTELS, BLOOD & BANCROFT, for appellees.

WALLING, Judge.

The appellees were plaintiffs and had judgment in the district court. The essential facts upon which the judgment depends, as they appear from the complaint of the plaintiffs below, as well as the evidence, are the following:

Bertha E. Rohlfing died on August 5th, 1907,

testate, her heirs at law being Frederick L. Rohlfing, her husband, and her two children, the appellees. The testatrix, at the time of her death, owned in fee simple certain real estate in the City and County of Denver, described in the complaint. By her will, she devised and bequeathed all of her property, real and personal, to the appellees, subject to the payment by them of a certain annuity to Frederick L. Rohlfing, so long as he remained single, and further subject to the right given said Frederick, if he so desired, to use, occupy and enjoy, as his home, until his death or remarriage, certain premises, situated in Wyman's addition to the city of Denver. His right to such occupation and enjoyment of said premises, as his home, could be terminated by him, by surrender in writing to appellees. The will was executed on the 30th day of June, 1894. Frederick L. Rohlfing consented to the making of the will by his wife, and to all of its dispositions and provisions, by a writing signed by him, of the same date, which was attached to the will and attested by the same subscribing witnesses. The will was admitted to probate and record in the county court of El Paso county, on September 9th, 1907, Frederick L. Rohlfing appearing at the probate thereof and consenting thereto; and a further formal written consent to the will, accepting its provisions, was executed by him, and filed in the county court, on the date of the probate. Subsequently, said Frederick L. executed an instrument called an "amended acceptance," which was likewise filed in the county court of El Paso county, in the matter of Bertha E. Rohlfing's estate. The latter instrument recited that it was made to correct a clerical error in the written con-

sent of September 9th, 1907, which erroneously stated the date of the will to be June 3d, A. D. 1894. (No importance will be attached to the so-called "amended acceptance" in the discussion which will follow.) Afterwards, by his written instrument, Frederick L. terminated and surrendered to the appellees all the right given him by the will to use, occupy and enjoy, as his home, the premises in Wyman's addition, as above mentioned. During Bertha E. Rohlfing's life, appellants Deutsch, Neef and Zang obtained a judgment in the district court of the City and County of Denver against Frederick L. Rohlfing; and on June 30th, 1907, an execution issued on that judgment to the appellant Nisbet, as sheriff, was, by direction of the judgment creditors, levied upon the undivided one-half ~~of all~~ of the real estate described in the complaint herein, and such undivided half was advertised to be sold under the execution. Appellees, as devisees under their mother's will, brought this action to cancel the levy, as a cloud upon their title, and for an injunction against the sale of any of the real estate, or any interest therein, under the execution against Frederick L. Rohlfing.

The first answer of the defendants to the plaintiffs' complaint consisted of (1) specific admissions and denials of its allegations, and (2) what was called a "further answer and cross-complaint". The substance of the second defense of the answer was that, at the time of the making of his wife's will, Frederick L. Rohlfing was indebted to defendants Deutsch, Neef and Zang, besides a number of other persons, and at that time, or shortly prior thereto, Frederick L. Rohlfing had property in his own name,

as had also his wife; that in July, 1903, said defendants obtained a judgment against Frederick L. for \$9,673.82, and filed a transcript of that judgment with the recorder of the City and County of Denver; that at the time of the making of Bertha E. Rohlfing's will, she and the plaintiffs knew of the indebtedness of Frederick L. to the defendants and others; that "in order to cheat, wrong and defraud the defendants and other creditors of said Frederick L. Rohlfing," the will was made, and the various consents thereto, accepting its provisions, were given by Frederick; and that the latter had no other property out of which defendants' judgment could be satisfied, other than the one-half of the property belonging to his wife at her death.

A replication was filed to the first defense of the answer, denying all new matters therein. (Since counsel for both parties are agreed that the first defense consisted of admissions and denials, and contained no "new matter", the replication may be disregarded, as superfluous.) At the same time, the plaintiffs demurred to the "further answer and cross-complaint" for insufficiency. The demurrer was sustained, and the defendants were given permission to amend their answer. Within the time allowed for that purpose, the defendants filed their amended answer, which contained three subdivisions, each of the second and third subdivisions commencing with the words, "For a further answer and cross-complaint," etc. Counsel are agreed that the first and third subdivisions of the amended answer are respectively the same as the first defense, and the "further answer and cross-complaint", contained in the original answer. In the second sub-

division of the amended answer, it was alleged, in substance, that on the sixteenth day of June, 1894, Frederick L. Rohlfing was indebted to the defendants and others in large amounts, and insolvent, and, with the intention of cheating and defrauding his creditors and the defendants Deutsch, Neef and Zang, said Frederick L. conveyed by quitclaim deed to his wife, Bertha E., for an alleged consideration of \$8,740, a part of the property described in the complaint, describing it, together with other property not here involved. It was further alleged, on information and belief, that there was, in fact, no consideration for that conveyance, and that the pretended transfer was sham and fraudulent; and that Bertha E. was aware of the purpose for which the conveyance was made, and was privy to the fraud. It was further stated that on the 16th and 19th days of June, 1894, Frederick L. conveyed to his wife certain other real property, not mentioned in the complaint; and, upon information and belief, that each of those conveyances was without consideration, and sham, and made for the purpose of cheating and defrauding the creditors of Frederick L., particularly Deutsch, Neef and Zang, with the knowledge and fraudulent connivance of Bertha E. Rohlfing; and that the transfers to his wife, as alleged, rendered Frederick L. insolvent, and his debt to the defendants uncollectible. It was alleged that the defendants had "just recently within the past six months become aware of the fraudulent character of the transfers before referred to."

The amended answer contained a prayer asking that the conveyance from Frederick L. Rohlfing to his wife of a portion of the property described in

the complaint be canceled, as fraudulent, and that the same be sold to satisfy the judgment of the defendants, and for other specific and general relief.

The plaintiffs filed a motion to strike out each of the three subdivisions of the amended answer severally, assigning separate and specific reasons for the motion with respect to each. The ground alleged for moving against the first subdivision of the answer appears to have been that no rule or order had been entered permitting the defendants to amend their first defense, while the ground of the motion as to the third subdivision was that its material allegations were identical with that part of the original answer, which had been adjudged insufficient on demurrer. The reasons assigned for moving to strike out the second subdivision will be noticed hereafter. Upon this motion, the order was made striking "the defendants' amended answer and all the defenses and counterclaims therein contained from the files."

Afterwards, the cause was set down for trial and tried before the court. The plaintiffs introduced in evidence certified copies of Mrs. Rohlfing's will, with the written consent of her husband of the same date attached, the order admitting the will to probate, the instrument consenting to and accepting the terms of the will, signed by the husband and filed in the county court on the date of the probate of the will, as well as the subsequent so-called "amended acceptance," and also the writing whereby he surrendered to appellees all the right given him by the will to the use and occupation of the premises in Wyman's addition, as his home, as above stated. Those proofs were introduced over

the objections and exceptions of the defendants, who offered no evidence. Thereupon the court gave a decree for the plaintiffs, wherein the levy upon the undivided one-half interest in the property described in the complaint, under the execution against Frederick L. Rohlfing, was annulled, and the defendants were perpetually enjoined from selling any part of or interest in said real estate, and it was adjudged that appellees were absolute owners of all of that property, free from any lien, right or claim of, or in favor of the defendants.

It is claimed that it was error to sustain the demurrer to the "further answer and cross-complaint" contained in the original answer, and a great part of the discussion in the briefs is devoted to matters supposed to be involved in that ruling. It seems, however, that we are precluded by the ruling of the supreme court from considering the decision on the demurrer. In *Heaton v. Myers*, 4 Colo. 59, 62, the court said:

"A defendant has no right to continue to present the same defense by different pleas (*Parks v. Holmes*, 2 Ill. 554), nor may he repeatedly refer to the decision of the court, the legal sufficiency of the same defense, under the guise of an amended plea. The defendant having taken leave to amend his fourth plea, waived his right to assign error on the action of the court, in sustaining the demurrer thereto."

In *Hurd v. Smith*, 5 Colo. 233, it was again held, under the code, that the amendment of an alleged defense, after demurrer sustained thereto, waived the right to assign error upon the ruling on the demurrer, and that an amended defense, which was

only a repetition of one adjudged insufficient on demurrer, might be struck out on motion, in the court's discretion.

In *Enright v. Midland S. & O. Co.*, 33 Colo. 341, 343, the cases above cited were approved, and the same rule was applied to the amendment of the complaint after demurrer sustained to the original. The court say:

"By taking leave to (file), and filing an amended complaint, the plaintiff waived any error committed by the court in sustaining the demurrer to the first amended complaint. *Perrigo etc. Co. v. Grimes*, 2 Colo. 651; *Heaton v. Myers*, 4 Colo. 59; *Hurd v. Smith*, 5 Colo. 233; *Rockwell v. Holcomb*, 3 Colo. App. 1. For this reason, the alleged error of the court in sustaining the demurrer cannot be reviewed here. * * When an amended complaint is, in effect, but a repetition of the one which it purports to amend, a motion to strike for that reason is well taken. *Heaton v. Myers, supra.*"

It is conceded that the third subdivision of the amended answer is simply a repetition of the second defense of the original answer to which the demurrer was sustained; consequently, it was not error to strike it out.

But the argument against the ruling on the demurrer to the second defense of the original answer includes one question—perhaps the controlling one on this branch of the case—which may be said to be fairly presented for consideration by the assignments based on exceptions to rulings on defendants' objections to evidence introduced at the trial, and also on their exception to the final judgment, without reference to the allegations of the answer. This

question may thus be stated: Could Mrs. Rohlfing disinherit her husband, by her will, with his consent, as to real estate owned by her at her death, so as to prevent appellants, judgment creditors of the husband, from levying their execution upon the interest, to which their debtor must have succeeded by law, if he had withheld his consent to his wife's will?—or, otherwise expressed: Did the appellees, in virtue of their mother's will, and the written consent to and acceptance of its provisions by Frederick L. Rohlfing, take the property devised to them, the appellees, subject to the claims of the judgment creditors of said Frederick? In fact, it is believed that the question stated would be found to be the substantial one involved in the demurrer to the original answer, if those pleadings were before us for consideration.

As bearing in some way upon the right claimed for appellants to proceed for the satisfaction of their judgment against the undivided one-half of the real estate devised by Mrs. Rohlfing's will, authorities have been cited bearing upon the nature and incidents of the husband's estate by the curtesy, as it exists at common law; and the effort has been made to deduce some analogy between the common law estate by curtesy, and the husband's right of inheritance with respect to the property owned by his wife at her death, existing by statute in this state. It is common knowledge that the husband's estate by curtesy, like the right of dower of the wife, has had no existence or recognition in this state; and there is no reason to suppose that principles applicable to curtesy or dower, as at common law, have influenced in any degree our legislation, as it ex-

isted when the state was admitted, and has existed to the present time, concerning the property rights of either husband or wife. It has long been settled, by repeated decisions of our courts, that, under our laws, the husband has no vested right, inchoate or other, by reason of the marital relation, in the property belonging to his wife, and that she holds an absolute legal estate in her real and personal property, whether owned at the time of marriage or acquired during coverture, as free from any common law right of her husband, as if she were unmarried. "As to her separate estate, she has no husband." *Wells v. Caywood*, 3 Colo. 487; *Palmer v. Hanna*, 6 Colo. 55; *Colorado Central R. Co. v. Allen*, 13 Colo. 229; *Knight v. Lawrence*, 19 Colo. 425; *Schuler v. Henry*, 42 Colo. 367. Decisions bearing upon the rights of the husband's creditors with respect to his estate by curtesy at common law afford no possible assistance in the determination of the claims of these appellants. The husband was without any legal interest in his wife's property, during her lifetime, and his creditors had no claim upon it.

The contention is urged, however, that inasmuch as, by our laws, a married woman could not, by her will, bequeath away from her husband more than one-half of the property, real and personal, belonging to her at her death, without the husband's written consent, the husband was entitled by inheritance to one-half of the deceased wife's estate, notwithstanding the dispositions of her will, and that the husband's right of inheritance became available to his creditors for the satisfaction of their demands, so that he could not, by consenting to the terms of the will, prevent his creditors from resorting, for

the satisfaction of their claims, to the undivided one-half of the property belonging to the deceased wife's estate. In the last analysis, this is the effect of the argument advanced by counsel for appellants. They say: "The status of the wife is fixed by chapter 83, Mills' Statutes. Sections 3010 and 3011 of said chapter provide that the wife shall not will away more than one-half of her estate without the husband's consent, while section 12, chapter 181, Session Laws of 1903, provides that the consent in writing of one must be given after the death of the other. At common law, the wife could not make a will. Under our statute she can only will one-half of her estate." The force of these statements is not obvious. At no time in the history of the state has a married woman been incapable of making a will, with or without the consent of her husband, nor is it true that "under our statute she can only will one-half of her estate." As stated in the opinion of the late Chief Justice Steele, in *Schuler v. Henry*, *supra*, "she may dispose of her property by will, and the law places both husband and wife upon the same level with reference to the disposition of property by will." The only restriction upon her absolute right to dispose of her estate by will was the one in favor of her husband, and that had no more to do with testamentary ability, than had the corresponding limitation upon the right of the husband to dispose of his property by will. In neither case did the restriction affect the validity of the will, but it operated only upon the dispositive provisions thereof, in case the spouse of the testatrix or testator survived, and did not consent to the will. *Logan v. Logan*, 11 Colo. 44. Moreover, it cannot with con-

sistency be said that Mrs. Rohlfing's will was not a valid disposition of her entire estate, as the law stood at the time of its execution, since her husband gave his consent in writing at that time, in accordance with the law then in force. Mills' Ann. Stat. § 3010. But it is insisted that, by force of the act of 1903, the consent given by the husband at the time of the making of the will was invalid at the time of the death of the testatrix. The question as to the retrospective operation of the act of 1903 upon the provisions of Mrs. Rohlfing's will is an interesting one, and its solution is by no means free from difficulty. We are not called upon to solve it, for the reason that counsel for appellees are apparently not disposed to contest the position, that the act of 1903 nullified the consent previously given by Frederick L. Rohlfing, and are content to base their argument on this branch of the case upon the consent given at the time of the probate of the will. In view of this agreement among counsel, it will be assumed, without deciding the point, that the law of 1903 is controlling. The applicable provisions of the last mentioned statute are the following:

"Every person, aged twenty-one years, if a male, or eighteen years, if a female, being of sound mind and memory, shall have the power to devise all the estate, right, title and interest in possession, reversion or remainder, which he or she hath or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents charged upon or issuing out of them, or goods, chattels and personal estate of every description whatever, by will or testament; all persons of the age of seventeen years, and of sound mind and mem-

ory, shall have the power to dispose of their personal estate, by will or testament; *Provided*, That no married man or woman shall by will devise or bequeath away, one from the other, more than one-half of his or her property, without the consent in writing of such other, executed after death of the testator or testatrix, but it shall be optional with such wife or husband, after the death of the other, to accept the condition of any such will or one-half of the whole estate, both real and personal." R. S. 1908, § 7070.

It is reasonable to suppose that everyone familiar with the history of our legislation would be willing to admit that "every person" and "all persons" would have included married women, even if they were not expressly mentioned in the proviso of the section last quoted; while the evident effect of that proviso was simply to give the surviving husband the same right with respect to his wife's will, after her death, which the wife had at all times exercised by law concerning the will of the husband. See Mills' Ann. Stat. § 3011. That is to say, the proviso made it optional with the surviving husband or wife to accept the provisions of the will of the deceased spouse, or one-half of the property, real and personal; belonging to the latter's estate. In this case, the husband exercised that option by appearing at the probate of the will and filing his written consent to and acceptance of its provisions, and the will was thereupon duly and solemnly admitted to probate. By his election thus made, he was irrevocably bound, and the order admitting the will to probate is conclusive of the legality and validity of its contents, as against all persons. Rev. Stat.

§ 7096. If appellants, creditors of Frederick L. Rohlfing, had a right to object to the provisions of the will, notwithstanding his consent thereto, it seems that they should have appeared to contest the probate in the county court, which was by the statute vested with ample jurisdiction in the premises, either at the time fixed for the hearing on the original application to admit to probate, or within the statutory period thereafter. But they had no interest in the deceased wife's estate upon which to base such contest. Their only right was against the property of their debtor, and such interest as he had in his wife's estate was acquired through her will.

Of the cases cited by counsel, the one which seems to be most applicable to the present controversy is the matter of *Fleming's Estate*, 217 Pa. 610. That case involved the right of the husband's creditors to compel him to elect to withhold his consent to the provisions of his deceased wife's will, and to elect to take the interest in her estate given him by the intestate laws. The substance of the statute, upon which the husband's right of election depended, was thus stated in the court's opinion:

"The power of a married woman to dispose of her property by will is so restricted by the Act of May 4, 1855, P. L. 430, 2 Purd. (12th ed.) 2104, 'that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate, as she can, when surviving, elect to take against his will in his estates, otherwise to take only her real estate as tenant by the curtesy.' "

With respect to the claim made on behalf of the husband's creditors, the court said:

"We think that the right of the husband to

elect to take against the provisions of his wife's will is simply a personal privilege and is not an asset for the payment of his debts or a right which he can be compelled to exercise so as to discharge his trust liabilities. Every sane person of lawful age in this commonwealth has a right to dispose of his property by will, and the policy of the law is to encourage the exercise of that right. A married woman has now the same right as her husband to devise her property and that right should not be curtailed by the court compelling an unwilling husband to defeat it by an election to take against her will. His action in the premises is optional with him, but if he wishes to respect the last wishes of his wife as well as carry out the manifest policy of the law he refuses to interfere with the disposition which she makes of her property. * * If the court may compel the husband to take under the intestate laws and against his wife's will, it may, with the same reason and by the exercise of the same authority, compel him to elect to take under the will. The action of the court would then depend in each case upon the interest of the creditor or other party to whom the husband was liable, and would deprive him of his statutory right to make the election. If the husband's interest in his wife's estate under the intestate law was greater than his interest under the provisions of her will, the court at the instance of the creditor would compel the husband to take against the will. If, on the contrary, the interest of the husband under the will should be greater than his interest under the intestate laws, the court would at the instance of the creditor compel the husband to accept the provisions of the will.

The election, therefore, would not be a personal privilege of the husband, which this court has declared it to be, but would be a right which the husband's creditor could control as his interest should demand. This would not be an election by the husband but by the creditor. Such was certainly not the intention of the legislature in conferring upon the husband the right of election."

This satisfactory reasoning may well be applied to the conditions of our own statute giving the right of election to the husband to accept the provisions of his wife's will or take his share of her estate, as in case of intestacy.

Counsel on either side have referred to the decision in *Wolfe v. Mueller*, 46 Colo. 339, as in some way affecting the merits of the present controversy, although that decision seems to afford little aid in the solution of the matter, unless by way of suggestion. In that case, the wife's will was made in 1906, and, upon her subsequent death, was propounded for probate. Her husband survived her, but died before the time fixed for the probate of the will, without having had any notice of the filing of the will. Subsequently, his children contested the probate of the wife's will, "in so far as one-half of the estate of (the testatrix) was concerned." The court held that the will had the effect to deprive the husband of more than one-half of his wife's estate, and that, inasmuch as he had not consented to its provisions, his heirs became entitled, upon his death, to the interest which he would have taken in the deceased wife's estate, if the latter had died intestate, and that the county court erred in admitting the

will to probate as conveying the wife's entire estate, the court saying:

"Under the terms of the statute, each spouse has the option to take the property given by a will or one-half of the estate, and unless the written consent is given, he must be deemed to have elected to take the portion under the statute. In this case, no notice was given of the filing of the will, and the surviving husband never had the opportunity of electing."

It will be observed that the conclusion of the supreme court was, not that the will was invalid, in whole or in part, but that the failure of the surviving husband to consent raised the conclusive presumption of his election to take under the law, and therefore that one-half of the wife's estate must be regarded as intestate property. But in the instant case, the surviving husband having consented to the will, it was admitted to probate finally, and without reservation or condition, as it should have been. To contend that such consent of the husband was fraudulent as to his creditors, because it defeated their hopes or expectations of receiving payment of their demands out of what he would otherwise have inherited under the statute, is simply to beg the whole question. If appellants had not the right to compel their debtor, either in the court of probate or a court of equity, to elect to take against the will, and we think they had no such right, they had no standing, after his consent to the will, to question its dispositions, in law or equity. The probate of the will related back to the death of the testatrix, so as to prevent intestacy as to any part of her estate; and the title to the real property devised to appellees

vested completely in them upon their mother's death. 1 Underhill on Wills, p. 21. The appellants are therefore without privity or interest respecting the property devised to appellees, precisely as if their debtor had died before his wife. No claim has been asserted in the briefs on the part of appellants as to the right given to Frederick L. Rohlfing by his wife's will to the use and occupation of the premises in Wyman's addition, as his home. Nothing in the foregoing discussion has any reference to the allegations of the second subdivision of the amended answer with respect to the property therein alleged to have been conveyed by Frederick L. Rohlfing to his wife, in June, 1894, in fraud of his creditors.

Having already disposed of the matter of the motion to strike out the amended answer, so far as it related to the third subdivision thereof, there remains for consideration the ruling on that motion with respect to the first and second subdivisions of that pleading. Appellants' counsel have not insisted in argument upon the assignment of error based on the striking out of the first defense of the amended answer. It is asserted in the brief for appellees, in effect, that the result of the order striking out the entire amended answer was to leave the case standing upon the complaint, the first defense of the original answer, and the replication thereto (the replication being of no effect), and that the cause was tried in the district court upon those pleadings and the evidence introduced by plaintiffs. Since appellants' counsel, in their reply, do not controvert any part of their opponents' statement in that particular, and no specific complaint has been made

concerning the action of the court in striking out the first defense of the amended answer, it will be assumed that they do not rely on that matter as prejudicial error.

It is earnestly contended, however, that the court erred in striking out the "further answer and cross-complaint", constituting the second subdivision of the amended answer. The grounds of the motion to strike this portion of the amended answer are understood to be, (1) That there was no application or order for leave to file the same; (2) That the attempt was made thereby to set up "an entirely new defense and cross-complaint not found in the original answer"; (3) That the defendants were barred by their laches, as well as by the statute of limitations, from attacking the conveyance therein mentioned as fraudulent; (4) That the defendants had knowledge of the matters therein set forth at the time of filing the original answer, and there was no sufficient showing why the defense or counterclaim had not been pleaded in the first instance. We are not advised as to the court's reasons for sustaining the motion to strike this defense or counterclaim, which the defendants undertook to plead for the first time in the amended answer. It is the settled rule of our courts that the matter of allowing amendments to the pleadings is ordinarily committed to the sound legal discretion of the trial court, which is only reviewable in a case of manifest abuse. *Cartwright v. Ruffin*, 43 Colo. 377; *Sigel-Campion Co. v. Holly*, 44 Colo. 580. We are of the opinion that the record does not show such manifest abuse of discretion in rejecting this amendment to

the answer, as to require the reversal of the judgment on that ground. The judgment is affirmed.

Affirmed.

Decided June 10, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3331.]

NORTHERN COLORADO IRRIGATION CO. v. POUPPIET.

1. IRRIGATION—*Duty of Irrigating Company.* A corporation operating a canal or ditch for conveying water for irrigation to the proprietors of the lands thereunder is bound to carry and deliver water to the class of consumers named in its certificate of incorporation, and the service must be performed for a reasonable maximum charge, to be fixed by the board of county commissioners, upon proper application made.

2. — *Right of Consumer.* The carrier may not exact of the consumer a *bonus*, as a condition of performing its duty. The land owner who has purchased water from such corporation for one or more years is entitled to continue such purchase in subsequent years, and the carrier is under a corresponding duty to carry and deliver the water.

3. — — *How Affected by Abandonment of a Prior Contract.* Plaintiff's grantor of certain lands had purchased of defendant "the right to receive and use water" from defendant's canal, for the irrigation of such lands. Nothing in the contract specifically required the grantor to continue for any definite time in the exercise of his right, nor was there in the conveyance under which plaintiff held the lands, any condition or requirement that he should observe or perform any of the conditions of the contract under which water had been obtained. Held that a provision of his contract that upon failure of the grantor to pay the annual rental, he should surrender all right or interest thereby created, did not necessarily involve a surrender of the statutory right to continue to purchase water for the same land, and that notwithstanding plaintiff's repudiation of the contract, his right under the statute was undeniable.

4. — *Order of County Commissioners Prescribing Rate of Charge—Effect.* The order of the county commissioners, made upon proper application, prescribing the rate to be charged by

an irrigating company, for the carriage and delivery of water, is binding upon the corporation until relief has been afforded in some appropriate proceeding.

5. ——— *Certainty Required in the Order.* The order of the county commissioners fixed the maximum rate to be charged by an irrigation company "for any irrigation season," "at \$1.00 per acre." The volume of water which the company was required to furnish was not prescribed. The consumer had for many years taken water from the same ditch, under a contract which prescribed the quantity as, "sufficient for the production of good average crops, under skillful irrigation, not to exceed" a certain prescribed volume. The order of the county commissioners was construed as based upon the long usage prevailing between the parties, and as therefore sufficient, notwithstanding its failure to specify the volume to be delivered.

6. PLEADING—*What Must Be Especially Pleaded.* Action against an irrigating company for refusing to furnish water to one entitled to it. Plaintiff, in order to obtain the water, had tendered a rate in excess of that prescribed by the county commissioners. Held that without pleading this, he was entitled to prove it, in order to relieve himself of the imputation of failing to do what was reasonable, in order to minimize his injury.

7. ——— *Construed.* Complaint held sufficient to admit evidence of a former adjudication of the rights asserted by plaintiff.

8. DAMAGES—*Duty of Plaintiff to Minimize.* One threatened with injury by the misconduct of another must do what he reasonably can to reduce his loss; but no case holds that he is required to do what is unreasonable, or what would occasion to him serious embarrassment, financial or otherwise.

9. ——— *Question for Jury.* And the question what was reasonably required of the plaintiff is for the jury.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. HUGH BUTLER, for appellant.

Messrs. CRUMP & ALLEN, and Mr. CLIFFORD W. MILLS, for appellee.

KING, J., delivered the opinion of the court.

The appellee as plaintiff brought his suit in the district court in and for the City and County of

Denver to recover from the defendant (appellant here) damages in the sum of \$4,760 for its alleged wrongful refusal to furnish water for irrigation purposes. Verdict and judgment were given in favor of plaintiff for the sum of \$2,300.

The complaint alleged that defendant was a Colorado corporation engaged in carrying water for irrigation to the premises of consumers along the ditch known as The Highline Canal, which was owned and operated by the defendant; that defendant was a common or quasi-common carrier of water, for hire, for irrigation purposes, and that as such, and for a reasonable consideration, it was bound to carry water from the South Platte river, and deliver the same to those entitled to make beneficial use thereof for irrigating lands under the canal; that plaintiff was the owner of a certain 40-acre tract of land under said canal, in Adams County, through which county the canal passed; that such land was arid, required irrigation, and had been irrigated from said canal since the year 1886; that defendant, as carrier, and for an annual compensation paid to it by plaintiff or his grantors, had furnished water for said land continuously from 1886 until the year 1904; that by reason of such use of the water by plaintiff and his grantors, plaintiff had and owned a water-right for said land by which defendant was required to furnish a sufficient quantity of water out of the said canal, when the same could be obtained, to irrigate said land, and that neither plaintiff nor his grantors had sold, forfeited or abandoned said water-right, or lost it by process of law, or otherwise, or "ceased to take water from said canal with the purpose or intent of procuring

the same from any other source of supply''; that about May 18th, 1904, the board of county commissioners of Adams County, in a proceeding brought for that purpose and to which the defendant was a party, fixed the maximum rate to be charged by the defendant for carrying water through its canal in Adams county, for any irrigation season, including the season of 1904 and thereafter, at \$1 per acre, and further found that the rate theretofore charged by the defendant, to wit, \$1.75 per acre, was unjust and unfair; that plaintiff tendered to the defendant the sum of \$1 per acre as fixed by said board, and demanded water for his said lands for that year, and again in 1905 made like tender and demand, both times in writing, all of which the defendant refused; that a sufficient quantity of water was in the stream and could have been obtained and delivered by the defendant except for its neglect and refusal. Plaintiff also alleged that after the respective tenders and demands in each of said years, and defendant's refusal as aforesaid, mandamus proceedings were instituted, in each of which, after hearing, defendant was ordered to deliver water to plaintiff upon tender of \$1 per acre; but notwithstanding said writs of mandamus the defendant did not deliver the water in sufficient quantity or early enough in the season to save or mature crops; that by reason of defendant's failure to deliver water, plaintiff suffered damage and injury by failure of crops, and permanent injury by the destruction of the alfalfa roots. The complaint contained two causes of action, one for the year 1904 and one for the year 1905.

The answer denied that defendant was a common carrier for hire, or that it had no ownership or

interest in the water carried, but alleged that it had the right to take and divert the water from the river and deliver it to certain persons by virtue of certain contracts theretofore made and then in force; denied that plaintiff, by reason of previous use of the water, acquired or owned a water-right for his land, or that he had any right to require defendant to furnish water to him; admitted the proceedings before the board of county commissioners and the order fixing the maximum rate, as alleged in the complaint, but alleged that the order made by said board was void, because such order *did not prescribe the amount of water* which the defendant should be required to furnish to any applicant; admitted the tender alleged by plaintiff for each of said years, but averred that the demand was not in compliance with the order of the board of county commissioners, because it was for not less than one cubic foot of water per second for each 53 acres, and of a date of priority not later than the year 1886; admitted that after its refusal of plaintiff's demands, writs of mandamus issued commanding it to furnish water upon payment or deposit of \$1 per acre, as alleged in the complaint, but averred that such writs, and each of them, were erroneously and wrongfully issued, and were void for want of jurisdiction in the premises.

The foregoing states substantially the issues as made by the pleadings, so far as necessary to be stated.

The evidence upon the part of plaintiff showed that he purchased the land from Mary Giesler, his deed being dated May 19th, 1897, by which she conveyed to him one-half section of land, including the forty acres described in the complaint, "together

with all water-rights in The Northern Colorado Irrigation Company," and that plaintiff had owned the land since that date; that the canal runs through the land, over 200 acres of it being under the ditch, but the water-right being for forty acres only, and that this land was set to alfalfa; that the water had been used on that place for 19 years or more, and was obtained through the ditch belonging to the defendant; that plaintiff had used water upon said land, each year, since 1897; that up to and including the year 1903, he had paid \$1.75 per acre for the use of said water; that in 1904 plaintiff made the tender as alleged in the complaint, which was refused, and that thereupon he instituted the mandamus proceedings and secured the writ as set forth in the complaint. The evidence tended to show that the irrigation season begins about May 1st, and that after the first week in July there is but little water in the ditch; that there was plenty of water in the canal from about May 1st to the end of the season, the flow that year being average and sufficient to have produced an average crop upon plaintiff's land if the water had been delivered. The average crop for the years 1897 to 1901, inclusive, was shown as a basis upon which to measure the loss sustained by failure to receive water in 1904 and 1905. Upon the question of the demand for water and tender of carriage fee, the evidence shows that plaintiff appeared at the home office of the company in Denver, made a tender of \$1 per acre, and upon defendant's refusal to accept, offered to pay and made tender of \$1.75 per acre, the rate then charged by the company, but made such offer under protest. The company refused to receive the fee of \$1 per acre, and

also refused to accept the tender of \$1.75 per acre under protest, nor unless plaintiff should sign a certain written application in form required by the company of applicants under its contracts for water-rights, and specifying that the application was made, and the water furnished, if at all, under the terms of such water-right contracts, which contained waiver of liability upon the part of the ditch company, authority for it to pro rate the water in times of scarcity, and provided for the submission of disputes to the superintendent of the company whose decision should be final, forfeiture, etc. Plaintiff was willing to pay the fee of \$1.75 under protest, subject to a determination by the court thereafter, but refused to sign the application, and notified the defendant that he was not claiming, and would not claim, under the water deed or contract between the company and his grantor, but that he claimed solely by virtue of his right, under the statutes, acquired by appropriation by his grantor, and the continuous use of the water by such grantor and himself. This ended negotiations for water. The mandamus proceedings required considerable time, so that when the peremptory writ was issued each year, the irrigation season, or a great part of it, had passed.

During the progress of the trial plaintiff offered in evidence the files, orders, judgment, etc., in the mandamus proceedings, for the purpose of showing that certain issues in the instant case, to wit, the right of plaintiff to receive and the duty of defendant to deliver water for the years 1904 and 1905, were *res judicata* in favor of the plaintiff. Objection made by the defendant to the reception of these

files and orders, for the reason that no such issue was made by the pleadings, was overruled.

Defendant offered no testimony with the exception of a certain contract or water deed, which was offered upon and as a part of the cross-examination of the plaintiff, and received by the court over plaintiff's objection.

The briefs filed by counsel for appellant present an interesting, able and elaborate discussion of all the objections raised by the assignments of errors, including questions pertaining to the character of the defendant as a carrier, the status of the holders of its contracts or deeds for water-rights, and their assigns, and the duty of such carrier to convey and deliver water to consumers, such as the plaintiff, at the rate fixed by the board of county commissioners. The argument is a protest against the law pertaining to such carriers as declared by the supreme court. Many of these questions seem to have been fully settled by decisions of that court, a number of which have been in cases to which the appellant herein was a party, and adversely to the contention of appellant's counsel, and therefore need not be reconsidered at this time. For instance, there is no question that under the constitution, statutes and decisions, the defendant was required to carry and deliver water to the class of consumers named in the certificate of its incorporation, whether, as a question of terminology, it may be called a common carrier, a quasi-common carrier or a quasi-public carrier; nor that this service must be performed for a reasonable maximum charge to be fixed by the board of county commissioners upon proper application, and that when such rate has been fixed, it is

binding upon the company until relief has been afforded in some appropriate proceeding; that such carrier may not exact a bonus as a condition precedent to the right of a consumer to secure water; that the land owner who has purchased water from such carrier, for one or more years, has the right to continue such purchase, and that a corresponding duty to deliver devolves upon the carrier. *Const.*, Art. 16, sec. 8; *Mills' Ann. Stats.*, secs. 570, 2297; *Golden Canal Co. v. Bright*, 8 Colo. 144; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582; *South Boulder etc. Ditch Co. v. Marfell et al.*, 15 Colo. 302; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450; *Northern Colo. Irr. Co. v. Pouppirt*, 47 Colo. 490.

The courts have not decided that a consumer of water, by contract with such carrier, may not so bind himself as to waive and lose his statutory and constitutional right to purchase water, irrespective of the contract, although there is a strong intimation to that effect in some of the authorities. The word "purchase" is used herein in the sense that it is held to have been used in the statute, namely, the right of the consumer to require the carrier to furnish the water upon payment of the proper charge for transportation.

(1) In oral argument counsel for appellant limited his discussion chiefly to the claim that the cause of action was based upon a tender by plaintiff of \$1 per acre, the maximum rate fixed by the board of county commissioners, while the cause was tried upon the tender of \$1.75 per acre, the rate demanded by the defendant, that said tender was not admissible in evidence because not pleaded, and that it constituted a variance; and to the further contention

that the judgment for plaintiff cannot be sustained for more than nominal damages, for the reason that plaintiff might have saved himself from substantial damages by complying with the company's demands. It is true that the tender of the rate charged by the defendant was not pleaded. It was not necessary that it should be. The cause of action was based upon a tender of an amount fixed by the board of county commissioners, as provided by law, and the cause of action was established. The tender of the amount charged by the defendant was offered and received, with other testimony, to show the effort made by plaintiff to save himself from injury, and did not constitute variance from the cause of action set forth in the complaint.

(2) The most serious question raised by the assignments of errors and discussed by appellant, is, that plaintiff could have saved himself from any substantial damage by paying to the defendant an additional sum of money to that tendered, amounting to not more than \$60 for the two years during which plaintiff's alleged loss was sustained, and therefore the judgment should not be affirmed. There is no rule of law better established than that which declares that in case an injured party seeks to recover damages from another, and such party, by some reasonable act on his part, might have lessened or prevented the loss for which he seeks to hold the other, the law requires the performance of that act. This rule is expressed in 1 Sutherland on Damages, sec. 88, 3rd ed., as follows: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury

as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him." And if an injured party can indemnify himself by a moderate expenditure of money, or the expenditure of a sum which is trifling as compared with the loss which he would otherwise suffer, he is legally bound so to do, and the reasonableness of such expenditure is measured by comparing the amount of his alleged damage with the sum necessary to have prevented the same. *Lloyd v. Lloyd*, 13 Atl. 639; *Sweeney v. Montana etc. Ry. Co.*, 65 Pac. 912, and cases cited. There is no case, however, to our knowledge, which requires the injured party to do anything unreasonable, or which would seriously embarrass him financially or otherwise. All that is required of him is to make a reasonable effort to save or reduce the loss. Only such consequences as result from his own wilful failure or gross neglect to use timely and reasonable caution to prevent an extension or increase of the loss or injury, would fall upon him. In this case it may be that if the plaintiff could have saved himself from all substantial damages by the mere payment of the additional sum of money required by the defendant, upon his failure so to do, the damages which he could recover would be nominal only, limited perhaps to the additional amount he would have been required to pay in order to secure the water. *Lloyd v. Lloyd*, *supra*. But it is not clear that in this case it would be reasonable to require plaintiff to pay defendant's charge without protest, to sign the written application and accept receipts referring to the contract, which plaintiff feared was

an attempt to place him in a position where defendant could successfully claim an estoppel. In addition to his offer to pay under protest, plaintiff instituted and prosecuted to a successful conclusion, each year, his suits for writs compelling the defendant to furnish him water; and the evidence further shows that such proceedings were made necessary in subsequent years, notwithstanding the said writs. Under the circumstances defendant's demands may have been unreasonable and arbitrary. However, the law is well settled that it is a proper question for the jury to determine what reason would have required the injured party to do or perform, in the light of all the facts in the case. *Sweeney v. Montana etc. Ry. Co.*, *supra*. That question was submitted to the jury under appropriate instructions, and its finding will be regarded as conclusive.

(3) It does not appear that the order made by the board of county commissioners of Adams county, fixing the maximum rate, was void, as contended by appellant, for uncertainty in prescribing the amount of water which the defendant should be required to furnish an applicant, nor that the demand made by plaintiff was not in compliance with such order. Section 2297 Mills' Ann. Stats. provides that any person who shall have purchased and used water for irrigation, for lands occupied by him, from any ditch or reservoir, and shall not have ceased to do so for the purpose and with intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his lands, on paying or tendering the price thereof fixed by the county commissioners. It is shown that under the contract, by the

terms of which plaintiff and his grantor had procured water from the defendant for 19 years or more, the quantity of water to be furnished had been designated as "sufficient for the production of good, average crops, under skilful irrigation", not, however, to exceed one cubic foot per second for each 53 acres. And the maximum rate therefor, prior to 1904, had been fixed by the county commissioners at \$1.75 per acre, and accepted by the defendant. Therefore, the amount prescribed by the county commissioners may be regarded as based on this usage, recognized by the parties, and the demand made was for substantially the same quantity per acre as had been furnished theretofore under such contract and usage.

(4) It is urged by defendant that plaintiff could not abandon the contract under which he and his grantor had been receiving water for so long a period, and require the defendant to continue to furnish water irrespective of that contract. The contract was not pleaded as a defense, but it was admitted in evidence upon and as a part of plaintiff's cross-examination, and its force and effect discussed both by appellant and appellee. There is nothing in its terms which specifically requires the grantee therein of the "right to receive and use water from the canal of the said party of the first part", to continue to exercise such right for any definite period of years, or which forbids an abandonment of the contractual rights by the grantee at any time thereafter. And the provision in said contract that upon a forfeiture, by the grantee, of his rights and interests through failure to pay the annual rentals, said grantee shall surrender all rights or interests there-

by created, does not necessarily include a surrender of the statutory right to continue to purchase water for the same land and in the same amount as theretofore used. It amounts to no more than a surrender of the rights under the contract. "In the absence of an express declaration to the effect that such omission or failure should produce a forfeiture of constitutional and statutory rights existing, collateral to those provided for in the agreement, such collateral rights would, in any event, unquestionably remain undisturbed." *South Boulder etc. Ditch Co. v. Marfell et al.*, *supra*. There is nothing in the deed by which plaintiff's grantor conveyed to him her water-rights in this canal which obligated him to keep and perform any of the conditions of the contract under which she had theretofore received water. The plaintiff having expressly abandoned all right and claim under the contract, and having so notified the defendant before and upon demand for water, and tender, we think his right to require defendant to furnish water was not affected by the terms of the contract.

It is earnestly contended that the admission in evidence of the pleadings, orders and other proceedings in the mandamus suits, was error, because there was no proper plea of *res judicata* to support the admission of this evidence for that purpose. The proceedings for, and the issuance of the writs were admitted by the pleadings. The files and orders were offered and received for the purpose of showing that the parties thereto were the same as in the present case, and that one of the issues in that proceeding was the same as raised in the instant case, to wit, the right of plaintiff to demand and receive

water from the defendant, and was decisive thereof so far as that point was concerned. We think the complaint was sufficient to admit the evidence for that purpose. 23 Cyc. 1525; *Grand Valley Irr. Co. v. Fruita Imp. Co.*, 37 Colo. 483; *Smith et al. v. Cowell et al.*, 41 Colo. 178.

Other objections raised by the assignments of errors do not require special consideration. The judgment is affirmed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3407.]

EMPIRE RANCH AND CATTLE CO. V. STRATTON.

1. WORDS AND PHRASES—"Or." A conveyance of lands to a trustee named, "or his successor in trust" is not void for uncertainty. "Or" is construed as "and."

2. TRUST DEED—*Substitution of Trustee—Recitals of Trustee's Deed.* A deed of trust of lands provides that the recitals in the deed of the trustee, executed pursuant to the powers of the trustee, shall be *prima facie* evidence of the facts stated therein. A deed purporting to be executed by a substitute trustee, reciting his appointment in apparent conformity to the provisions of the deed of trust, by one declared to be the legal holder of the promissory notes secured by the deed of trust, will be accepted as *prima facie* evidence of the regularity in all respects of the appointment of such substitute.

3. *Ejectment—Judgment—Cancellation of Tax Deed.* The judgment in an action of ejectment may extend to the cancellation of a void tax deed. *Rustin v. M. & M. T. Co.*, 23 Colo., 351, followed.

But the decree must be limited in its effect to the particular lands demanded in the action. It is not to be extended to other lands described in the deed.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. B. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

CUNNINGHAM, Judge.

Appellee (hereinafter referred to as plaintiff) brought her action in ejectment in the district court of Washington County, alleging ownership in herself, and the wrongful detention by appellant of the north west quarter of section eleven, township two north; range fifty-one west, Washington County, and asking that she be let into possession. The answer was a general denial. On the trial the plaintiff, to prove ownership, introduced a United States patent to James M. Hunt; a trust deed from Hunt to George W. Toms, trustee, to secure a note payable to the order of Charles A. Stillman. The plaintiff also introduced a paper purporting to appoint W. S. Stratton as substituted trustee, and a trustee's deed from the said Stratton to herself. The defendant relied upon a certain tax deed which it offered in evidence, but which was excluded by the trial court upon objection made by plaintiff. The tax deed was void on its face, and therefore properly excluded. Inasmuch as the tax deed was invalid for reasons that have been frequently considered and disposed of by this court, and in the supreme court, in cases in which both counsel for plaintiff and defendant have appeared, no good purpose will be subserved by our pointing out such defects, and we shall accordingly limit our consideration of the case to the various objections urged by

counsel for appellant to the instruments upon which plaintiff bases her claim of title.

1. The trust deed from the patentee Hunt to Toms, contains a phrase in the granting clause reading as follows: "Has and hereby does grant, bargain, sell and convey unto said party of the second part or his successors in trust" the land described. Appellant insists that because in the phrase quoted the disjunctive conjunction "or" is used, that the trust deed is void for uncertainty as to the grantee. In support of this contention, counsel for defendant has presented an able argument, in which he says: "This must be decided on principle, because we believe no precedent can be found in the books." We are not disposed to agree with the conclusion of counsel that the question is a novel one. In Vol. 6, Words and Phrases, beginning at page 5002, will be found many pages of citations and quotations dealing with the word "or" and its construction. We shall call attention to but one case, viz: *White v. Crawford*, 10 Mass. 183-7, where the following appears:

" 'Or', as used in a deed stipulating that the grantor 'or' his heirs should have the privilege of a road to pass and repass from the highway, should be construed to mean 'and'. To effectuate the intention of the parties it is not unusual to construe 'or' as 'and' ".

A celebrated English judge has said that there is no magic in particular words, further than as they show the intent of the parties. From the trust deed in which the phrase objected to occurs, it is easy to gather that it was the intention of the grantor therein named to vest the legal title of the property in

Toms, with power, upon certain conditions therein name and hereinafter referred to, to the owner of the notes secured by the trust deed, to substitute a trustee for the said Toms. We think appellant's objection to the trust deed is untenable.

2. The trust deed to which we have called attention, contained the following clause:

"AND IT IS FURTHER AGREED, by the party of the first part, that in case of death, * * of the said party of the second part, at any time when action under the foregoing powers and trusts may be required, then the legal holder or holders of said note shall have the option of substituting any other person in his stead by writing duly acknowledged, and the actions and doings of said party so substituted shall be as effectual and binding as if done by said party of the second part. And such person so substituted shall have power * * * to make sale as hereinbefore provided."

On the trial the plaintiff introduced an instrument denominated "Substitution of Trustee", which instrument was signed and acknowledged by the plaintiff, and thereafter placed of record in the county clerk's office. This instrument recited, among other things, that Toms, the original trustee, had died, and that plaintiff was the legal holder of the note secured by the trust deed. The trustee's deed introduced by plaintiff, being the instrument upon which she relied for her title to the premises, among other things, contained the following recitations:

"That, whereas, the said George W. Toms is deceased, and Mary E. Stratton, the legal holder of

said note, has, by writing, substituted the said W. S. Stratton as trustee," etc.

The note secured by the trust deed was not offered in evidence, nor was there any proof whatever offered to establish the transfer of the note by the original payee or the ownership of the same by the plaintiff, other than the instrument known as the Substitution of Trust, and the trustee's deed. It is probable that the instrument known as the Substitution of Trust was not competent to prove the transfer of the note to the plaintiff, or her ownership thereof. Therefore, it becomes necessary for us to consider and determine whether the recitals in the trustee's deed are *prima facie* proof of such ownership and sufficient, in the absence of any evidence tending to contradict said recitals, to establish plaintiff's title to the land. In *Carico v. Kling*, 11 Colo. App. 349, it is said: "Even where the deed of trust does not provide that the recitals in the trustee's deed shall be *prima facie* evidence of facts therein stated, it is held that such recitals are *prima facie* proof of the matters stated in them.

Citing: *Beall v. Blair*, 33 Ia. 318; *Ingle v. Jones*, 43 Ia. 293; *Saving & Loan Society v. Deering*, 66 Calif. 286; *Tartt v. Clayton*, 109 Ill. 585.

The following provision appears in the trust deed before us: "And it is agreed that the recitals in said deed (referring to the trustee's deed made either by the original trustee or his successor) shall be taken and accepted as *prima facie* evidence of the facts therein stated."

In *Webster v. Kautz et al.*, No. 3441, recently decided, we had before us a trust deed in form substantially the same as the one here under considera-

tion. In his opinion, Walling, Judge, speaking for the court, said: "Under the circumstances disclosed by the record, the plaintiff was not required to show a perfect and indefeasible title, and it does not appear that the defendant had any possible interest in the objections urged against the sufficiency of the plaintiff's proof."

And again: "It is not necessary that the written appointment (of the substituted trustee) should have stated any reason for such substitution; and even if the writing executed for the purpose had stated an insufficient ground for action by the holders of the note, the evidence of a valid cause for making the appointment might nevertheless have been shown by competent proof. Such proof was supplied by the recitals of the trustee's deed."

Counsel for defendant, in his brief, drew an alarming picture of the results that may follow a holding that the recitals in the trustee's deed before us are *prima facie* sufficient proof of the matters stated in them, and states in his brief:

"If it were not for the high standing and reputation of the plaintiff's distinguished counsel, we should positively assert that the plaintiff knows that, as a matter of *fact*, as well as *law*, Charles W. Stillman (the original *cestui que trust*) is still the owner of that note, and George W. Toms is still a living man, and that the plaintiff has no interest whatever in this case."

This is a serious insinuation, but one which we can hardly be expected to accept in lieu of proof. Plaintiff filed her case on September 16, 1907. The trial occurred July 3, 1908, more than nine months thereafter. The decree of the court appears not to

have been filed in the district court until November 16, 1908. The brief from which the above quotation is taken was not filed in the supreme court until April 10, 1909. If there be any basis for the intimations appearing in the excerpt which we have made from its brief, it would appear that ample time had elapsed between the filing of the complaint in the district court, and the submission of the case on the briefs in this court, to enable the defendant, in some appropriate manner, to present the facts to the trial court, or to this court. Under the statute the defendant had a right to call the plaintiff, and put her on the stand, under oath, and compel her, as on cross-examination, to give testimony on all the matters to which it has directed our attention in the quotation which we have made from its brief.

3. Appellant complains in its brief of the action of the trial court in decreeing a cancellation of its tax deed, and insists that because the action was in form in ejectment, that equitable relief could not be granted, and that the trial court was without power or authority to annul its tax deed. The rule announced in the case of *Rustin v. M. & M. T. Co.*, 23 Colo. 351, appears to overthrow the contention of counsel, and the Rustin case was an action in ejectment. But in this connection, it may be well to call attention to the fact that the tax deed or deeds cancelled by the decree of the trial court described several tracts of land not involved in this case. The effect of that clause of the trial court's decree cancelling the tax deed or deeds held and offered in evidence by the defendant should not extend beyond the land involved herein, viz., the northwest quarter section 11, township two, north range fifty-one

West, Washington County, and so far as the decree may be in conflict with the views we here now express, the same is modified.

Perceiving no substantial error in the record, the judgment of the trial court will be affirmed.

Affirmed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3411.]

EMPIRE RANCH AND CATTLE CO. v. HOWELL.

1. *APPEALS—Harmless Error.* Errors not affecting the substantial rights of the complaining party will not be regarded, e. g., where, in a bill to quiet title, the plaintiff avers title in fee and proves only an equity, defendant showing no title.

2. *TAX TITLES—Deed Construed.* A treasurer's deed recited that the treasurer, "at a tax sale publicly held on the 19th day of October," exposed to sale the lands described therein "in substantial conformity with the statute;" that no bid was offered for any of the lands, that the treasurer became satisfied that no sale of the lands could be effected and "did bid off at said sale," in the name of the county, all the said lands—a line in the printed form, reciting that the treasurer passed the land for the time, and reoffered it on the last day of the sale, being stricken out. Held to show conclusively that the land was bid in by the county upon the first day upon which it was offered and that the deed was void upon its face.

A deed reciting that the treasurer on the 31st day of October, "at an adjourned sale begun and held on the 5th day of October," exposed to sale, in conformity with the statute, the lands described therein, that no bid was offered for any of the lands or any portion thereof, "exposed to sale and remaining unsold at said sale," and that * * * the treasurer "having passed such real property for the time, did offer and reoffer for sale from day to day until the 31st day of October, being the last day of the sale." Held that the deed either failed to show when the lands were first offered, or that they were not offered at all until October 31st, and the deed in either case was void on its face.

3. — *Limitations.* The seven year limitation (Rev. Stat., sec. 4090) is not available to one claiming under a tax deed not of record for the full term of seven years, at a time when an action for the recovery of the lands is instituted.

4. — *Color of Title—Payment of Taxes.* One asserting title to unoccupied lands, under the statute (Rev. Stat. 1908, sec. 4090) must show (1) Color of title obtained in good faith, (2) Payment of taxes by the holder of such color of title for the full period of seven years; and such color of title and payment of taxes must exist, concurrently without interruption, through the full statutory period. Taxes which are already due and payable when color of title is acquired, and which are afterwards paid, are not to be counted as one of the payments required by the statute.

5. *STATUTES—Construed.* Secs. 4089, 4090, Rev. Stat. 1908, are *in pari materia*, and must be construed together.

6. *CASES OVERRULED, Explained, or Distinguished.* *Stephens v. Clay*, 17 Colo., 489, explained.

7. *MORTGAGOR AND MORTGAGEE—Estate of Mortgagee.* The legal title of the mortgagee is recognized only for the benefit of the holder of the mortgage debt. As against all other persons the mortgagor has the legal estate.

One who conveys by deed of trust is a mortgagor within the rule.

8. *APPEAL—Judgment.* A decree vacating tax deeds containing several parcels of land modified so as to limit its effect in this particular to the lands described in the complaint.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

CUNNINGHAM, Judge.

Appellee, as plaintiff below, brought his action in ejectment in the district court, alleging that he was the owner in fee simple and entitled to the immediate possession of some twenty quarter sections of land situated in said county. Plaintiff further alleged "that the defendant wrongfully withholds the possession of the said premises from this plaintiff,

and wrongfully and unlawfully continues to exercise acts of ownership thereover, and claims to own the same." By the prayer of his complaint plaintiff asked that he be adjudged the owner in fee of the said land, and entitled to the immediate possession thereof; that he be let into possession of said lands as against the defendant, and all persons claiming or to claim by, from or under it; for his costs and all other proper relief. The defendant company answered, denying each and every allegation of the complaint, and for a second defense admitted that it was in possession of the several tracts of land; alleged that it was the owner thereof under deeds severally conveying to the defendant the said several tracts of land; that the defendant, having claim and color of title adverse to the plaintiff, made in good faith, had paid the taxes thereon for seven successive years; that no other person or persons had paid any taxes on said land during the aforesaid period; that the land was vacant and unoccupied during all of said period. In its prayer the defendant demanded judgment that it is the owner of the said several tracts of land and entitled to the possession thereof.

1. Plaintiff's claim of title to a large number of the tracts of land involved was based upon a trustee's deed executed by a trustee named in a second deed of trust, the owner of said land having given two trust deeds at or about the same time on these tracts of land. There was evidence introduced on the trial showing that the plaintiff was the owner and in possession of all of the notes which the first trust deeds were given to secure, and that he had the same in court, together with the trust deeds securing the same. Appellant contends that the second trust

deeds being given subject to the trust deeds preceding them could convey nothing more than an equity of redemption, since the first trust deeds conveyed the whole legal title; hence, it contends that the trustee's deeds resulting from the foreclosure of the second trust deeds could convey no more than an equity of redemption, and therefore, the legal title of the land was not in the plaintiff, and his action must fail since he alleged in his complaint that he was the owner in fee simple. In other words, appellant contends that there was a fatal variance between the pleadings and the proof. It is not seriously contended by defendant that the plaintiff might not have recovered in an action of this sort, had he plead and proven an equitable title. But, inasmuch as he plead fee simple title and proved equitable ownership only, defendant insists he must go out of court. In this connection the defendant complains also of the findings and decree of the court adjudging the plaintiff to be the owner in fee simple of the land. It is further contended by the appellant that nothing but possession was involved in this case, and the decree ought not to have gone beyond the determination of that single question. Both by the prayer of the complaint, and the prayer of the answer, it will be seen that each of the parties to the action sought to have the question of title determined by the court. The defendant's title was predicated entirely upon tax deeds. If these tax deeds were sufficient, they constituted paramount title, and the case must be reversed; if they were void, then the decree of the court adjudging the plaintiff to be the owner in fee simple of the land is not prejudicial to appellant, even granting that the language of the decree goes

by the plaintiff's evidence, and it cannot be said that the plaintiff is a party to the action. Should a judgment be entered just and regular, be set aside because the plaintiff alleged title in fee, and in the trial proved equitable title? The answer must be a qualified legend upon the nature of the action and the substantial rights of the defendant. The legislative and judicial branches of our state government have frequently declared against reversing the decisions of trial courts for errors not affecting the substantial rights of the losing party. The following are a few of the many cases so holding: *Salazar v. T. Co.*, 18 Colo. 547; *Miller v. Williams*, 27 Colo. 39; *D. Co. v. Grand Valley Ir. Co.*, 28 Colo. 154; *Geiger v. Kiser*, 47 Colo. 301; *Coe v. Waters*, 7 Colo. App. 297-9; *B. Co. v. Koon*, 8 Colo. App. 470; *Roberts v. H. Co.*, 21 Colo. App. 450; 122 Pac. 60; *Denver City Tram. Co. v. Armstrong*, No. 3302; 21 C. A. 640.

In the case of *Coe v. Waters*, *supra*, in an able opinion on petition for rehearing, the late Judge Bissell, who wrote the opinion, speaking of variance, uses this language:

"Doubtless if the defendant had been surprised by the testimony and a totally different case had been made from that which he was called upon to answer, he would have been entitled to a continuance. He might likewise, perhaps, in the present instance, have compelled an amendment to the complaint so as to have presented a legally accurate statement of the plaintiff's action. Taking no steps in either one of these directions, we do not regard the question of variance as so saved in the record as to call for a specific judgment respecting it. While we concede

the complaint is not so drafted as to present with technical accuracy the cause of action, it was according to the verdict of the jury sustained by the proof. It did contain all the allegations requisite to the plaintiff's recovery."

2. The appellant based its claim of title to the land in question on two certain correction tax deeds issued by the treasurer of Washington County. There are certain serious, if not fatal, defects in the original tax deeds, and it is reasonable to suppose that the two correction deeds were issued for the purpose of meeting or correcting these defects. It is not necessary in the view we take of the correction deeds to consider the defects in the original deeds. Nor is it necessary for us to determine whether the treasurer of Washington County was authorized to issue said correction deeds. The first correction deed relied upon (being Exhibit 3) contains, among other things, the following recitations, omitting unnecessary portions:

"Know all men by these presents, that whereas the following described real property (here describing a portion of the property involved in this action) situate in the county of Washington, state of Colorado, was subject to taxes for the year A. D. 1895 * * and whereas the treasurer of said county did by virtue of the authority vested in him by law, at a tax sale, the sale publicly held on the 19th day of October, A. D. 1896, severally expose at public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, each tract of said property for the payment of taxes, etc. * * * and whereas no bid

beyond what the evidence warrants, and it cannot bind or affect one not a party to the action. Should a judgment, if otherwise just and regular, be set aside because the plaintiff alleged title in fee, and on the trial proved equitable title? The answer must, we apprehend, depend upon the nature of the action and the substantial rights of the defendant. The legislative and judicial branches of our state government have frequently declared against reversing the decrees of trial courts for errors not affecting the substantial rights of the losing party. The following are a few of the many cases so holding: *Salazar v. Taylor*, 18 Colo. 547; *Miller v. Williams*, 27 Colo. 39; *Doland v. Grand Valley Ir. Co.*, 28 Colo. 154; *Geiger v. Kiser*, 47 Colo. 301; *Coe v. Waters*, 7 Colo. App. 207-9; *Burchinell v. Koon*, 8 Colo. App. 470; *Roberts v. Handasyde*, 21 Colo. App. 450; 122 Pac. 60; *Denver City Tram. Co. v. Armstrong*, No. 3302; 21 C. A. 640.

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was made or offered by any person at said sale for any of the land * * * offered, to sale and remaining unsold at said sale, and particularly for the said above described real property, or any part of it, and said treas— he became satisfied that no more sale of any property and particularly the real property herein specifically described, so offered, could be effected at public sale, thereupon said treasurer did bid off at said sale for and in the name of said county of Washington, all the lands," etc.

There is a portion of a line appearing in the exhibit offered as a copy of said correction deed, reading as follows: "having passed such real property over for the time, did re-offer it until on the last day of the sale." which has been erased, or through which a line is drawn. From the above it conclusively appears that the land in question was bid in by the county on the first day that the same was offered for sale. It follows, therefore, that this correction deed was void on its face, and under repeated rulings of our supreme court.

The second correction deed relied on (being exhibit 20) embraced the remaining portion of the land involved in this action. This deed contained the following recitals:

"Know all men by these presents, that whereas, the following described real property, to wit: (describing a certain portion of the land involved in this action) were subject to taxation for the year A. D. 1895 in the said former county of Arapahoe, and whereas the taxes separately assessed upon said real estate for the year aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did on the 31st

day of October, A. D. 1896, by virtue of the authority vested in him by law, at an adjourned sale, the sale begun and publicly held on the 5th day of October, 1896, severally expose to public sale * * * in substantial conformity with the requirements of the statute * * * the said several parcels of real property above described * * * and whereas, no bid was made or offered by any person at said sale for any of the land or portion thereof offered and exposed to sale and remaining unsold at said sale * * * the treasurer having passed such real property for the time, did offer and re-offer for sale from day to day until the 31st day of October, being the last day of the sale," when, as appears, the treasurer bid the same off for the county. It is clear that this property was not offered for sale until the 31st day of October, whereas the sale, it appears, had begun on the 5th day of October. The deed says that "the treasurer of said county did on the 31st day of October, A. D. 1896," do certain things. And those certain things appear from the recitals following to be to expose or offer the property for sale and striking it off to the county. If the treasurer had also exposed or offered it for sale on any day between the 5th day of October, when the sale was begun, and the 31st day of October, the day when the sale was made, it would have so recited in the deed. See *Bryant v. Miller*, 48 Colo. 194.

It is true that the deed recites that the treasurer passed the property and did offer and re-offer it for sale from day to day until the 31st day of October, but if he offered it for the first time on the 31st day of October, he could not have passed it from day to day, and this recitation is manifestly untrue. If he

offered it on days previous to October 31st, it would have been an easy matter to have recited on what days it was so offered. It is said in *Charlton v. Toomey*, 7 Colo. App. 304, that every preliminary step required to divest the owner of title must affirmatively appear in the recitals of the tax deed to have been regularly taken as required by law. It is also said in the same case that when the property has been reached on the tax sale: "It must be offered, and if no outside bid is made it must be offered on the next, and each succeeding day until the close of the sale. * * * After being first offered it must be continuously offered from day to day until the sale is concluded; all efforts to affect a sale must be exhausted; and the treasurer can exercise no previous discretion; and the county can only become a purchaser of the entire tract in default of an outside bidder, after an opportunity had been offered each day."

While, as we have said before, the deed does recite that the treasurer "did offer and re-offer it (meaning the land) for sale from day to day until the 31st day of October, being the last day of the sale," it nowhere appears when he first offered the land, or on what day or days he offered it, unless, as we construe the recitals of the deed, it was offered on the 31st day of October, being the last day of the sale, and the day the land was sold. In other words, the land was offered, for the first time, and sold, on October 31st, the last day of the sale, or else we have no information whatever as to how many times the land was offered for sale or on what days it had been previously offered for sale. Hence, we have no basis for determining whether the treasurer acted arbi-

trarily and whether his satisfaction that no more bids could be obtained for the land was reasonable or otherwise. In the *Charlton-Toomey* case, *supra*, it is said: "It is true that the section contains the following: 'Or until the treasurer shall become satisfied that no more sale can be affected'. But this must be so construed as to harmonize with the balance of the section, otherwise it would invest the treasurer with an arbitrary discretion that he might exercise at any time in contravention of the balance of the section."

This deed is substantially, if not precisely, the same in form as the one before us in the case of *Empire Ranch & Cattle Co. v. Howell*, No. 3406, decided by this court recently, and which we held to be void on its face.

We think clearly that under the rule laid down in *Bryant v. Miller*, *supra*, and *Charlton v. Toomey*, *supra*, this deed is void on its face for the reasons already pointed out. Hence, it is not necessary to consider other alleged defects therein.

3. Appellant further insists that even if the tax deeds under which its claim of title to the land in controversy is made be void on their face, still it has title by virtue of compliance with Section 4090 R. S. This contention is ably and elaborately presented by counsel for appellants in their briefs, certain phases of the statute of limitations being discussed which we do not find it necessary to consider or pass upon. The record shows that the tax deeds upon which appellant relies had not been of record seven years at the time appellee instituted his action. In *Sayre v. Sage*, 47 Colo. 568, our supreme court ruled:

“As it appears the defendant was not in possession of the lode mining claim in controversy for the period of seven years between the date his tax deed was filed for record and the commencement of the action against him,” [and such is the situation in the case under consideration] “and that five years had not elapsed after his tax deed was recorded before plaintiff instituted the suit * * * neither of the sections relating to limitations was available as a defense.”

In the *Sayre* case all the various statutes of limitation applicable to real property had been plead and relied upon by the defendant. Therefore, under the authority of the *Sayre* case, assuming, but not deciding, that the seven-year statute of limitations was properly plead by the defendant in the case at bar, still it was not available as a defense.

The judgment of the trial court is affirmed.

Affirmed.

Supplemental opinion filed Oct. 14, 1912.

ON PETITION FOR REHEARING.

CUNNINGHAM, Judge.

In its petition on rehearing appellant vigorously insists upon the contention made in its behalf in the original brief that its title had been perfected under and by virtue of sec. 4090 R. S. In the original opinion we ruled against this contention on the authority of *Sayre v. Sage*, 47 Colo. 568. Counsel for appellant, in his brief on rehearing, insists that the *Sayre* case is not authority, contending that that case turned upon original sec. 6 of the Act of 1893, or

sec. 4089 R. S., instead of original sec. 7, Sec. 4090 R. S. We still are of opinion that the rule in the Sayre case is applicable and controlling, but inasmuch as the question has been presented on oral argument in cases later to be decided and involving large tracts of land, we feel justified in presenting in a supplemental opinion our views somewhat fully on the points raised and discussed by counsel for appellant in his original brief and in his brief on motion for rehearing in this case and in oral arguments in other cases later to be determined.

The defendant, The Empire Ranch and Cattle Company, on January 23rd, 1901, took an assignment from the county of Washington of a tax certificate to certain lands, which certificate had theretofore and some time during October, 1896, been issued to the county by the county treasurer upon the sale of lands for delinquent taxes for the year 1895. This tax certificate having been assigned to it by the county clerk (apparently in virtue of a resolution adopted by the board of county commissioners who were attempting to proceed under sec. 3926i M. A. S., (Vol. 3), the defendant presented the same to the county treasurer on the 18th day of February, 1901, and received a tax deed for the land embraced in the certificate, and the deed was recorded on February 19, 1901. We thus have in the record the date of the assignment of the tax certificate and the name of the officer assigning the same, viz., the county clerk. This officer appears to have assigned the certificate more than three years after the date of its issue. The resolution of the board of county commissioners, which appellant introduced in evidence, nowhere authorizes or empowers the county clerk to

make this assignment, at least not in terms, as far as we can gather from the abstract or bill of exceptions, and it may well be doubted whether under the ruling in *Monson v. Gillette*, 51 Colo. 147, 116 Pac. 1055, and *Lambert v. Murray*, 52 Colo. 156; 120 Pac. 415-20, the attempted assignment of the certificate of purchase by the county clerk was not fatally defective, and therefore and for this additional reason the tax deed void. At the time the aforesaid tax deed was taken by defendant and put of record, viz., February 19, 1901, the taxes for the year 1900 on the land included in the certificate which the county had attempted to assign appellant were then past due. Promptly after recording its deed, the defendant paid the taxes for the year 1900 on the land included in the deed and the aforesaid certificate of purchase. Thereafter and before this suit was instituted, defendant paid the taxes for the years 1901 to 1906 inclusive, each of said payments being made in apt time. The suit was begun on July 10, 1907. Thereafter and pending the suit, the defendant also paid the taxes for the year 1907, paying them in 1908.

1. We may not have stated the facts with absolute accuracy, but we think the statement, even if inaccurate, is not at all prejudicial to either party, and serves the purpose of bringing clearly into view the question presented for our determination, viz., can the first payment made by the defendant after it had recorded its tax deed, that is, the taxes for the year 1900, (which were paid in February, 1901, after the recording of the deed) be considered and counted as one of the seven payments provided for in Sec. 4090 R. S. This section reads as follows: "Whenever a person having color of title, made in

good faith, to vacant and unoccupied lands, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes for the aforesaid, shall be entitled to the benefit of this section. Provided, however, if any person, having a better paper title to said vacant and unoccupied land, shall during the said term of seven years, pay the taxes assessed on said land for any or more years during the said term of seven years, then and in that case such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section." (L. '93, p. 328, § 7.)

Defendant's contention, which we shall state substantially in the language employed by its counsel in his original brief, is that under said Sec. 4090, "*the payment of taxes* is the leading feature, and the statute says *whenever* that is done seven successive times by a party 'having color of title' then the bar of the statute is complete.

Referring to the preceding section, 4089, which applies to the payment of taxes for seven years by one in actual possession under claim and color of title made in good faith, and which we need not quote, counsel for the defendant says in his brief:

"The idea of a period, or term, pervades the first section. The idea of repetition of the payment of taxes assessed is prominent in the other. In the first section the bar of the statute is complete at the

end of the period when 'possession *and* payment' shall have continued *concurrently* seven years, while, in the second section (4090 here under consideration) the bar is complete *whenever* the seventh payment is made. * * * In the second section the payments are several distinct entities producing results 'whenever' the last one is completed."

And further, counsel says: "Being vacant and unoccupied, the payment of taxes was the only visible assertion of ownership. Seven successive times in that number of years the party having color of title by the payment of taxes thereon, notified the previous owner in a manner which could be ascertained, that he claimed that land," meaning the land in controversy.

We find this further statement in counsel's brief: "The legislature entirely omitted in the second section all references to possession, or any period of time."

We have attempted to state fully the contention of counsel for the defendant, using, as nearly as practicable, his own language, and we shall now proceed to a consideration of the same.

As we have seen, defendant's tax deed was recorded in February, 1901. This action was begun on July 10, 1907, hence, at the time of the institution of this action, defendant had had color of title for considerably less than seven years. We cannot accept counsel's view of sec. 4090, for, as we read it, the legislature did not omit all references to "any period of time". In the last sentence of the section it is provided that "if any person having a better paper title to said vacant and unoccupied land *shall during the said term of seven years*, pay the taxes

assessed on said land for any one or more years *during the said term of seven years,*" the running of the statute is thereby arrested. And in the preceding sentence it is said: "All persons holding under such taxpayer, by purchase, devise or descent, *before said seven years shall have expired,* and who shall continue to pay the taxes as aforesaid so as to complete the payment of taxes for the aforesaid shall be entitled to the benefit of this section." Thus, at least three times, the legislature does make reference to a period of time, and the period of time is always seven years. We think that sections 4089 and 4090 are *in pari materia*, and must be read and construed together. The only substantial difference between the two sections is that in 4089 possession is required, while in 4090 the land must be vacant and unoccupied. But whether we are correct in this or not, certainly the last two sentences of sec. 4090 must be construed in connection with the first sentence, on which defendant bases its entire argument that it may complete the bar of the statute by paying the taxes for seven successive years, no matter when such payments be made. It is not necessary for us to, and we do not, decide that the seven payments of taxes provided for in sec. 4090 must be payments of taxes levied or assessed after the color of title has been obtained. All we determine is that taxes that have been assessed and which are due and payable at the time the color of title is taken cannot thereafter be paid and counted as one of the seven payments required by the statute, and that seven full years must elapse between the first payment of taxes on vacant and unoccupied land and the institution of the suit to recover the land. In other words, to

establish title by limitations, under section 4090 R. S., three things are necessary: First, color of title obtained in good faith; second, payment of taxes for the full period of seven years by the holder of such color of title, or by someone acting for him; third, these two things must exist concurrently without interruption, and must continue throughout the seven years. *Goss v. Wheeler*, 229 Ill. 272.

That seven full years must elapse between the date of the first payment of taxes and the commencement of the suit is sustained by a long line of decisions made by the supreme court of Illinois, from which we borrowed our statute. *Knight v. Lawrence*, 19 Colo. 431.

The following Illinois cases were decided before 1893, the date of the enactment by our own legislature of Section 4090: *Stearns v. Gittings*, 23 Ill. 387; *Dickinson v. Breeden*, 30 Ill. 279; *Clark v. Lyon*, 45 Ill. 388; *McConnel v. Konepel*, 46 Ill. 519; *Lyman v. Smilie*, 87 Ill. 259; *Holbrook v. Debo*, 94 Ill. 327; *Iberg v. Webb*, 96 Ill. 415; *Smith v. Prall*, 133 Ill. 308.

Illinois has repeatedly, since 1893, the date of the adoption of our statute, reaffirmed her earlier rulings, but it is not necessary to cite all the later cases.

Washington, having a similar, if not an identical statute, in *Tremmel v. Mess*, 89 Pac. 842, follows the decisions in Illinois, as does also South Dakota, in *Bennett v. Moore*, 99 N. W. 855.

In the *Bennett* case, the South Dakota supreme court uses this language:

“The statute in effect provides for a forfeiture of the property of the former owner * * * and

should therefore be strictly construed. It would seem essential that the party paying the taxes and claiming the benefit of the statute should have color of title in good faith during all of the ten years in which the taxes are being *assessed and paid, and that the two must exist together.*"

The italics are ours. The only distinction observable between the South Dakota statute and our own is that the period in South Dakota is ten years instead of seven. See also *Sibley v. England* (Ark.), 11 S. W. 820; *Gaither v. Gage* (Ark.), 100 S. W. 80.

2. On rehearing counsel for appellant again with much vigor renews his contention that no title passes by a second deed of trust given subject to a prior deed of trust, and that only a bare right to redeem is conveyed by a trustee's deed based on the foreclosure of such second deed of trust. To support this contention much reliance is placed on *Stephens v. Clay*, 17 Colo. 489. A casual reading of the opinion in the Stephens case discloses that Judge Helm, who wrote the same, made no distinction between the right to redeem, the equity of redemption and the *equitable title*, and specifically states that the equitable title remains in the trustor until divested by sale under foreclosure proceedings regularly brought. Mr. Warvelle in his late work on ejectment, (1905, § 142) thus defines the relation of the mortgagor to the title of the land on which he has given a mortgage:

"Notwithstanding that by the common law the legal title and estate in the mortgaged lands passed to and became vested in the mortgagee upon the execution of the mortgage, the principle was early announced in the American cases, that as to all the

world, except the mortgagee, the freehold remained in the mortgagor in the same condition in which it was prior to the mortgage. Being thus clothed with all his rights as a freeholder, as to all persons other than the mortgagee or his assigns, it followed that he might maintain any action for an injury to the inheritance or possession, and the mere fact that the legal title was in the mortgagee could not be urged as a defense. Where, as is generally the case, the mortgage is regarded as a mere lien, the right to recover possession from a stranger cannot be questioned, as this is one of the attributes of ownership and is an inseparable right of property."

In the case of *Adams v. Shirk*, 117 Fed. 801-5, this language appears:

"The legal title of the mortgagee is recognized only for the benefit of the holder of the mortgage debt. Against all other persons the mortgagor is the legal owner of the estate."

See also *Lewis v. Hamilton*, 26 Colo. 263.

In this respect there appears to be no distinction between a trustor and a mortgagor. *McGovney v. Gwillim*, 16 Colo. App. 284-5; *Seaman v. Bisbee*, 163 Ill. 91.

It appears that several of the tax deeds offered in evidence by appellant described tracts of land not in any way involved in this suit. The judgment of the trial court declared all of the aforesaid deeds void and decreed their cancelation. The trial court was without authority to extend the effect of its decree beyond the lands described in the complaint, and to the extent it attempted so to do, its decree is hereby modified.

Discovering no reason other than that last above

stated for modifying the original opinion handed down in this case, the rehearing is denied, and the decree of the trial court as modified will stand affirmed.

Rehearing denied.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

MORGAN, Judge, not participating.

[No. 3413.]

LOUGEE V. BEENEY.

1. *LIMITATIONS—Payment of Taxes.* A payment of taxes upon lands after an action brought for the recovery thereof is not accepted to support a plea of the seven year limitation act.

2. *PROCESS—Service by Publication—Affidavit.* An affidavit to secure publication of the summons in a civil cause, made by the attorney therein, or which fails to give the post office address of the defendant, no explanation being made for the failure of the plaintiff to make the affidavit, and no excuse for the omission to give the defendant's address, is not a compliance with the statute. (Rev. Code, sec. 45.)

A judgment by default upon publication of the summons upon such an affidavit is a nullity and may be assailed collaterally.

3. *APPEALS—Harmless Error.* A decree vacating a prior decree which is a mere nullity is not prejudicial, even if erroneous.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

CUNNINGHAM, Judge.

Appellee, who will be hereafter referred to as plaintiff, brought his action in ejectment in the dis-

trict court to recover possession of the north west quarter ($\frac{1}{4}$) section twelve (12) town two (2) north range fifty (50) west, Washington County. The answer was a general denial followed by a supplemental answer setting up payment of taxes for seven years, the last payment of taxes being made by the defendant on the first day of January, 1908. The complaint was filed on August 7th, 1907. The original answer, as we have seen, was a general denial only, and was filed December 24, 1907. The supplemental answer referred to was filed July first, 1908. Thus it will be seen, the seventh payment of taxes plead in the supplemental answer was made almost eleven months after the institution of the suit, and a few days after the filing of the answer. Institution of suit stopped the running of the statute of limitations, and the seventh payment of taxes made under the circumstances related, cannot avail defendant. Indeed, no contention is made by him in the brief that the statute of limitations as plead in the supplemental answer is relied on.

The defendant appears to rely wholly for his title upon a certain decree of the county court of Washington County, purporting to quiet title to the premises in controversy in one Margaret D. Dickson, defendant's grantor. This quiet title proceeding in the county court, resulting in the aforesaid decree, was brought by Margaret D. Dickson as plaintiff. The affidavit for publication of summons in the case in the county court was made by Dickson's attorney. This affidavit is fatally defective in two respects: (a) It was not made by the plaintiff, but by her attorney, without any reason being given why the plaintiff herself did not make the affidavit. (b) The

affidavit does not set forth the postoffice address of the defendant. Counsel for defendant does not contend in his brief that the affidavit is sufficient, but insists that the decree being fair on its face could not be attacked collaterally. The contrary has been expressly ruled by our supreme court in *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115; 117 Pac. 1005.

Complaint is made by appellant of the trial court's decree in that it purported to vacate not only defendant's title, but the entire decree of the county court. That decree (that is, the decree of the county court) purported to quiet title to the land in controversy here, and no other. Under the ruling in the *Empire Ranch and Cattle Company* case, *supra*, and the authorities there cited, that decree is a nullity and could never avail the defendant in any action. Therefore, we are unable to perceive how defendant could have been prejudiced in any manner by the wording of the decree rendered by the trial court in this case.

The judgment of the district court is affirmed.

Affirmed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3424.]

EMPIRE RANCH & CATTLE CO. v. SAUL.

1. TAX TITLE—*Void Deed*. A treasurer's deed which recites that the treasurer, at a tax sale publicly held "on the 19th day of October, A. D. 1897," exposed the lands to public sale, that no bid was made for any part thereof, that having passed the lands for the time, he "reoffered it, until the last day of the sale he

became satisfied that no more sales * * * could be effected, at such sale," and thereupon struck the lands off to the county, shows that the lands were sold to the county on the first day on which they were offered, and is void.

2. *Process—Service of Summons by Publication—Affidavit.* The statute authorizing constructive service of the summons in civil actions must be strictly pursued. An affidavit by one not shown to be the attorney or agent of the corporation plaintiff, or which makes no mention of the post office address of the defendant, giving no excuse for the omission, is not a compliance with the statute. A decree given by default upon mere publication of the summons, upon such an affidavit, is without validity and may be assailed collaterally. A statement that the residence of the defendant is unknown is no excuse for the failure to give his post office address.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

HURLBUT, J.

This is an action in the nature of ejectment, under § 265, Mills' Annotated Code, and is similar in its main features to a number of other cases decided at this term of the court, in each of which the same company appears as appellant, each case involving the question of the validity of tax titles to land located in Washington county. Complaint is in usual form, and the answer, after putting in issue the allegations of the complaint, purports to plead title in defendant by virtue of the payment for seven successive years of all taxes assessed upon the land under claim and color of title in good faith, the land being vacant and unoccupied, basing this plea on § 4090, revised statutes. There are two assignments of error relied upon in this case, either of which

would be decisive of this appeal, to wit, assignments number four and five. Number four challenges the ruling of the trial court in excluding from evidence exhibit four, a tax deed dated April 30, 1908, purporting to convey the property in issue to appellant, by the county of Washington. When appellant (defendant below) offered this deed in evidence it was objected to upon the ground that the deed was void on its face and did not show that the sale was continued from day to day until bid in by the county. In examining that exhibit we extract the following:

"Whereas the treasurer of said county did, by virtue of authority vested in him by law, at a tax sale, the tax sale publicly held on the 19th day of October, A. D. 1897, severally expose to public sale, at the office of the county treasurer, in the county aforesaid, in substantial conformity with the requirements of the statute. * * *

"Whereas no bid was made or offered by any person at said sale for any of the lands * * * and particularly for the said above described real property or any part of it, and said treasurer having passed said real property over for the time, did reoffer it until the last day of the sale he became satisfied that no more sales of said real property, and particularly the real property herein specifically described, so offered, could be effected at such sale. Thereupon said treasurer did bid off at said sale for and in the name of said county of Washington the lands," etc.

It will be noticed here that only one date is mentioned in the deed upon which the property was offered for public sale, namely October 19th, and that the county purchased it that day. It is clearly pro-

vided by § 3888, Mills' Annotated Statutes, that on the day designated in the notice of sale the treasurer shall commence the sale of lands, and shall continue the same from day to day, Sundays excepted, until each parcel has been sold, and that if there be no bid for any tract offered the treasurer shall pass it over for the time and re-offer it at the beginning of the sale next day until all the tracts are sold or until the treasurer shall become satisfied that no more sales can be effected, in which case it shall become his duty to bid off for the county the land remaining unsold. It will be seen from this that no legal sale of lands to the county can take place on the first day of the sale or on the first day it is offered for sale. This exhibit affirmatively showing that the county bought the land on the first day it was offered for sale, shows a violation of the provisions of the statute just mentioned. There was no error in the court excluding the deed from evidence. This question has been settled time and again by our appellate courts. *Charlton v. Kelly*, 7 C. A. (Colo.) 301; *Charlton v. Kelly*, 24 Colo. 373; *Tunnel Co. v. Gregory*, 38 Colo. 212; *Bryant v. Miller*, 48 Colo. 192; *The Empire Ranch & Cattle Co. v. Lardner Howell*, Colo. C. A., June 10, 1912.

The next assignment, number five, questions the ruling of the trial court in admitting in evidence, over defendant's objection, certified copy of the complaint, summons and affidavit for publication in cases numbered 607 and 562, county court of Washington county, wherein, in the former, appellant was plaintiff and appellee et al were defendants, and in the latter appellant was plaintiff and appellee was defendant. The two decrees in these cases were ad-

mitted in evidence without objection. In rebuttal plaintiff offered the affidavits for publication and other documents mentioned. The two decrees were based upon constructive service. If the affidavits for publication, as they appear in evidence, fail to state those facts required by the statute, the orders of publication issued thereon are of no force or effect. § 41, Mills' Annotated Code, contains among other things this provision:

"Service by publication shall be allowed only after summons issued and return thereon made that the defendant after diligent search cannot be found. * * *

"After return is made as aforesaid * * * the plaintiff, or one of the plaintiffs, may file in the office of the proper clerk an affidavit stating that the defendant resides out of the state or has departed from the state without intention of returning or concealed himself to avoid service of process, and giving his postoffice address if known, or stating his postoffice address is not known to affiant, whereupon the order of publication shall be made by the clerk. * *

"When the affidavit gives the postoffice address of the defendant the clerk shall mail a copy of the summons duly stamped, to the defendant at such address forthwith."

The affidavit for publication made in this case states:

"The affiant, for the purpose of finding said defendant and ascertaining his place of residence, has made diligent inquiry of and among residents nearest said land and of the postmaster at Burdett, Colo., the postmaster nearest said land, and of the postmaster at Akron, Colo., and is informed and believes

is not now and does not reside in this state, and that his present place of residence is to affiant wholly unknown."

We notice that the plaintiff in each of the county court cases was a corporation (appellant here), and that the affidavit purports to have been made by one August Muntzing, but whether or not he was attorney or proper agent of plaintiff does not appear from the abstract. It has been held time and again that where service by publication is relied upon to give jurisdiction over a non-resident the statutory requirements must be successively and accurately taken. *O'Rear v. Lazarus*, 8 Colo. 608; *Beckett v. Cuenin*, 15 Colo. 281; *Brown v. Tucker*, 7 Colo. 30.

No mention whatever is made in the affidavit as to the postoffice address of the defendant. This is one of the material recitals in an affidavit for publication of summons, and its omission renders a judgment or decree void for want of jurisdiction of the party in court by constructive service only, and such judgment may be attacked collaterally. The recital in the affidavit to the effect that defendant's place of residence is to affiant wholly unknown may be true in fact, and at the same time his postoffice address be fully within the knowledge of affiant. In other words, such recital is in no way equivalent to a statement that defendant's postoffice address is at a certain place or that such address is unknown. In actions founded upon constructive service of summons the whole policy of the law is to lodge with the defendant, if possible, a summons which on its face notifies him of the attack upon his property rights and gives him timely notice to appear in the court and defend if he cares to do so. The law requires a sworn statement

from the plaintiff stating the defendant's postoffice address, or if not known to recite that fact. If an affidavit omitting such statement should be held a sufficient compliance with the statute, then the purpose of the law as above suggested could be easily defeated. It would enable a plaintiff having knowledge of defendant's postoffice address to suppress such knowledge and thus evade delivery of summons to defendant, the very thing the statute seeks to accomplish. By the plain language of the section quoted the affidavit for publication must *state* the postoffice address of defendant, or that such address is unknown to the affiant. The omission of such statement from the affidavit renders it void and does not justify an order for publication of summons based thereon. *The Empire Ranch and Cattle Co. v. Coldren* (Colo.) 117 Pac. 1005. This case clearly holds that a decree founded upon constructive service, wherein the affidavit for publication fails to include the statement concerning the postoffice address of defendant, is void and of no validity whatever and can be attacked directly or collaterally at any time.

The conclusions we have reached concerning the two assignments of error dispose of this appeal against appellant. The judgment is affirmed.

Affirmed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3425.]

EMPIRE RANCH & CATTLE CO. v. MASON.

1. LIMITATIONS—*Color of Title*. A treasurer's deed of lands sold for taxes is not color of title until recorded.
2. EVIDENCE—*Admission in Pleading*. An admission in pleading that a tax deed was issued is no admission that it was recorded, or that the same is valid.
3. PROCESS—*Service of Summons by Publication—Affidavit*. A decree given by default, upon mere publication of the summons, upon an affidavit which fails to state the post office address of the defendant, or that it is unknown, and contains no direct statement of the non-residence of the defendant, or of his concealment, or departure from the state, is without validity.
3. JUDGMENT—*Jurisdiction of the Person—Recitals of the Record*. Recitals of a decree by default that "plaintiff's attorney filed his affidavit showing defendant's non-residence, and that after diligent search and inquiry he can not ascertain his whereabouts or post office address," will not be accepted as conclusive of the matters so recited, where the affidavit upon the files fails to disclose such matters. It will not be inferred that any other affidavit was presented.
4. LIMITATIONS—*Tax Deed—Five Year Statute*. The short statute of limitation (Mills' Stat., sec. 3904; Rev. Stat., sec. 5733) is not available to defendant in an action to quiet title.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. ISAAC PELTON, for appellee.

HURLBUT, J.

Action to quiet title under § 255, Mills Annotated Code. The answer denies every allegation in the complaint, except that alleging the corporate capacity of plaintiff, and pleads eight defenses to plaintiff's cause of action. The proofs fixed the title to the disputed premises in plaintiff, and it becomes

necessary to ascertain if the record discloses a better title in defendant.

The second defense avers unqualified title and ownership in defendant, of the disputed premises, by virtue of a tax deed from the treasurer of Washington county, executed and recorded February 20, 1901. Plaintiff in her replication denies that said deed was recorded, but admits that it was issued by the treasurer based upon a prior certificate of tax sale of the land. This deed was not offered in evidence by defendant and we are at a loss to understand why it now claims any title whatever to the lands in issue under that instrument. Plaintiff could safely admit (as she did in her replication), that said deed was issued by the treasurer to defendant, but having denied its record it did not become color of title in favor of defendant unless recorded, and indeed did not become the evidence of any title whatever to the land in defendant under the showing made by this record. At the trial, as shown by the abstract, the following colloquy took place:

“Mr. Gilmore: This treasurer’s tax deed having been admitted in replication as having been issued to the defendant, and that *it is on record* in the recorder’s office of Washington county, the defendant now offers in evidence his tax receipts, showing that it paid, under color of title to the said deed, the taxes on this land for the years 1900 and 1901 and each succeeding year thereafter, including 1907, each inclusive, being more than seven successive years of taxes assessed under color of title.

“The Court: The tax deed has not been offered in evidence yet, has it?

“Mr. Gilmore: No, the evidence is offered under

color of title as set forth in the answer and admitted in the replication.”

Plaintiff objected to the offer of the tax receipts, which was sustained. The defendant's attorney was in error in making the statement which he did concerning the replication. By reading that pleading it will be seen that plaintiff neither admitted the recording of the deed nor that the deed showed color of title in defendant. And moreover it alleged that the same was wholly void in law, and averred many defects in the proceedings of the revenue officers upon which the sale and deed were founded, some of which if they appeared upon the face of the deed would render it void upon its face, but not having the deed before us, it not being in evidence, we are not justified in speculating upon the contents of the same. It is clear from the record that if defendant had intended to rely upon its title acquired by this deed it was necessary to have introduced it in evidence. We have been cited to no authority, and we believe none can be found, which supports appellant's contention to the effect that the admission by a party in his pleadings that his adversary holds a tax deed from the treasurer is an admission of the validity of such deed; and that by reason of such admission the party will be deemed to have admitted that such tax deed was a good and valid muniment of title, where, as in this case, its validity is directly challenged by the replication. The defendant, having wholly failed to support his alleged title by sufficient proof, and having further failed to show that he had color of title to the premises, his defense in that behalf, as well as that founded upon payment of taxes for seven successive years under claim and color of title in

good faith, is not sustained. *Morris & Thombs v. St. Louis National Bank*, 17 Colo. 231; *Sayre v. Sage*, 47 Colo. 559.

It will next be necessary to notice the third and fourth defenses, by which defendant attempts to prove its title to the disputed premises under and by virtue of a decree of the county court of Washington county rendered April 2, 1902. This decree was founded upon constructive service. The decree was admitted in evidence without objection, but on rebuttal plaintiff introduced a certified copy of the complaint, summons and affidavit for publication. The affidavit fails to state the postoffice address of defendant, or that such address is unknown to affiant, and does not contain any direct statement of non-residence; neither is there any statement as to the departure of the defendant from the state without intention of returning; nor of his concealment to avoid service of process. This is fatal to the judgment founded upon the publication of summons under this affidavit. *The Empire Ranch & Cattle Co. v. Coldren*, (Colo.) 117 Pac. 1005. In that case it is held that the affidavit for publication is jurisdictional and if insufficient a judgment based thereon is open to direct or collateral attack. But counsel calls our attention to that part of the decree which reads as follows:

"Whereupon the plaintiff's attorney filed his affidavit in this cause, *showing* that said defendant was and is a non-resident of the state of Colorado, and that after diligent search and inquiry he does not know and cannot ascertain the whereabouts or postoffice address of the defendant."

It will be noticed that the decree recites that

"plaintiff's attorney filed his affidavit in this cause *showing* that said defendant," etc. The decree does not purport to say that the affidavit *states* the matters recited, but the word "*showing*" is used. It seems apparent that the court was construing the identical affidavit for publication which is in evidence. No reasonable inference can be drawn that there might have been another and subsequent affidavit filed in the cause. Counsel says in his brief that this being a construction by the court of the facts recited in the affidavit we are precluded from disturbing his findings in that behalf. We understand the rule to be that where depositions or written documents are introduced at the trial the appellate court is not bound by the construction placed upon their contents by the lower court. It is the province of such appellate courts to construe such proofs regardless of the trial court's construction. It is our duty to examine this affidavit and ascertain therefrom whether or not it contained sufficient averments to warrant the order of publication. Again, the recital in the decree, "he does not know and cannot ascertain the whereabouts *or postoffice address* of the defendant," is not supported by the statements in the affidavit. The affidavit nowhere states that affiant knew or did not know the postoffice address of defendant. From the recitals in the affidavit concerning affiant's efforts to "find defendant and her place of residence," the court may have felt justified in arriving at a judicial conclusion that such efforts *showed* affiant did not ascertain or know defendant's postoffice address. The affidavit does not impress us as making any such showing. However, the question is immaterial, as the statute plainly says

the affidavit shall *state* the facts required to appear in the same. This was not done, and the decree founded thereon was null and void.

There are other assignments of error discussed in appellant's brief, which will only be briefly noticed. Appellant invokes as a defense the "short statute of limitations," § 3904, Mills' Annotated Statutes. The record showing the ground to be vacant and unoccupied at all times, we do not think this defense available to defendant in this action. It is not an action in ejectment, that defense being only available in an action for the *recovery* of land sold for taxes. The former owner must have been ousted from, or in some manner disturbed in, his possession before it can be said that he can maintain an action to *recover* the premises. The record fails to show that defendant had any title whatever to the premises, or had possession thereof or any color of title thereto. The defense of the seven-year statute of limitations wholly failed of proof for the reason that the record failed to show that defendant acquired color of title to the premises and continued to hold the same during the time of the payment of the taxes.

For the reasons given the judgment is affirmed.

Affirmed.

Decided July 8, A. D. 1912. Rehearing denied
October 14, A. D. 1912.

[No. 3431.]

EMPIRE RANCH & CATTLE CO. v. GIBSON.

1. TRUST DEED—*Substitution of Trustee—Recitals in Deed of Substitution.* When a deed of trust of lands provides for the appointment of a substitute to the trustee, and that the recitals

of the trustee's deed, upon sale made pursuant to the powers contained in the trust deed, shall be *prima facie* evidence of the truth of the matters recited, evidence *aliunde* is not required to support a deed by a substitute trustee, even as against one who claims title from a different source.

2. **TAX TITLES—Void Deed.** A treasurer's deed of lands sold for taxes, showing upon its face that the lands were offered upon only one day, and were on that day struck off to the county, is void.

3. **LIMITATIONS—Color of Title.** A tax deed becomes color of title only when recorded.

4. — **Taxes Paid After Action Brought,** are of no avail to support a plea of the seven years statute of limitation.

5. **PROCESS—Constructive Service of Summons,** founded upon an affidavit which fails to comply with the statute is without effect. *Lougee v. Beeney, ante,* followed.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. R. H. GILMORE, for appellant

MR. JOHN F. MAIL, for appellee.

HURLBUT, J.

Action by appellee (plaintiff below) against appellant (defendant), under § 265, Mills' Annotated Code, to recover possession of lands in Washington county. Complaint is in usual form. The answer denies plaintiff's title, and pleads title and possession in defendant, also the seven-year statute of limitations applicable to vacant and unoccupied land (§ 2924, Mills' Annotated Statutes). Supplemental answer was filed July 1st, 1908, after suit commenced, alleging that defendant had paid the taxes on the lands for the year 1907, after suit brought. Replication was filed, putting in issue all matters alleged in the answer. Judgment for plaintiff, from which defendant appeals.

At the trial plaintiff dismissed his action as to the southwest quarter of section three, described in the complaint. The proofs show that title to the disputed premises was vested in plaintiff, one of the muniments of which was a trustee's deed admitted in evidence over defendant's objection. This deed was based upon a previously executed trust deed which provided for appointment of a successor in trust, by the legal holder of the note, in the event of the refusal or inability of the original trustee to act, such successor to be appointed by writing duly executed and acknowledged by the legal holder of the note. Under this provision a substitution of trustees was made in accordance with its terms. The note itself was not produced in evidence, nor were the facts alleged in said substitution proven or attempted to be proven by any evidence or testimony other than the writing itself. Appellant contends that, inasmuch as it claims title to the premises from an entirely different source than that of appellee (which we do not decide), the recitals in the trustee's deed are not binding upon it, contending that the facts therein recited must be proven by competent testimony *aliunde* in order to establish plaintiff's title to the premises. This contention cannot be upheld. The trust deed contained a provision to the effect that the recitals in the trustee's deed, if thereafter made, should be *prima facie* evidence of the facts therein stated and the same were directed to be taken and accepted as such. It has been held by the former court of appeals, *Carico v. Kling*, 11 Colo. C. A. 349, as well as this court, that in such case, no evidence aside from the deed and its recitals is necessary to be produced in order to

show *prima facie* title in the party claiming thereunder. The case of *The Empire Ranch & Cattle Co. v. Mary E. Stratton*, handed down at this term of this court, has so decided, and Judge Cunningham, speaking for the court, therein fully discussed this identical question, supporting the conclusions reached by citation of various authorities.

After plaintiff had rested his case, defendant, in support of its title, offered in evidence a number of treasurer's deeds, certified copies of proceedings of county commissioners of Washington county respecting the lands in issue, and various petitions to, and tax certificates issued by, the board of county commissioners of Washington county, to all of which plaintiff objected. The court sustained such objections, except as to the tax deeds being offered as color of title only, and documents showing amount of taxes paid.

One of the objections made by plaintiff to each of the treasurer's deeds was that it was void on its face, for the reason "that it showed that the land was never offered for sale except on the 31st day of October, 1896, and was stricken off to the county on that day, it being the first, last and only time it was ever offered at the sale".

On examining the record in case No. 3406, *The Empire Ranch & Cattle Co. v. Lardner Howell*, decided by this court June 10th, 1912, we discover that the identical deed here considered was there before the court for consideration, and the court, speaking through Judge Cunningham, held the tax deed to be void on its face, which holding involved the determination of the same question here raised by appellant. We therefore hold under the authority of

that case that the deeds before us are void on their face.

Appellant also insists that the year 1900 should be included in the term of seven successive years respecting the payment of taxes on vacant and unoccupied land under color of title. It appears from the record that its tax deed was recorded February 20, 1901, and that the defendant thereafter paid all the taxes on the land until the time suit was commenced. Under the decisions of our supreme court, the date the deed was recorded fixes the time the defendant acquired color of title, and whether the term of seven years begins to run from the recording of the deed or from the time of the first-payment of taxes is immaterial in this case, for whichever theory be adopted the full term of seven successive years had not expired when this action was begun, hence the plea of the statute of limitations invoked was not sustained by the proofs. *Empire Ranch & Cattle Co. v. Lardner Howell*, decided at this term of the court (No. 3411).

Defendant also showed at the trial, under supplemental answer, that in 1908, after the action had commenced, it paid the taxes for the year 1907, and contends for a construction of the statute authorizing this to be done, regardless of the time suit is begun. We think this position is untenable. The authorities are almost a unit to the effect that the beginning of an action arrests the running of the statute of limitations against the subject matter of the suit. *Lougee v. Beency*, decided at this term of the court; *Converse v. Dunn*, 166 Ill. 25.

The last point to be noticed is that concerning alleged errors predicated upon the refusal of the

trial court to admit in evidence two decrees of the county court of the city and county of Denver, each of which purported to quiet title to the lands in issue in appellant as against Charles A. Stillman and others, said Stillman appearing of record as the *cestui que* trust in a certain trust deed executed by Allen Monroe, the original patentee of the land, the title of said Allen Monroe having subsequently vested in appellee by virtue of the trustee's deed hereinbefore mentioned. In *Lougee v. Beeney, supra*, the court passed upon the validity of a county court decree of Washington county based upon constructive service, in which the errors discussed and passed on were in all respects similar to those urged concerning the two decrees here under consideration. The court in that case held the decree to be void for want of jurisdiction. Under the authority of that case the two decrees before us were void for want of jurisdiction in the county court to render them. What has been heretofore said disposes of this appeal.

The judgment is affirmed.

Affirmed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3468.]

MUTUAL LIFE INSURANCE CO. v. LOWTHER.

LIFE INSURANCE—*Construction of Policy—Change of Beneficiary.* A policy of life insurance reserved to the insured the right to revoke the appointment of the beneficiary therein named, and designate another, "by filing a written notice thereof at the home office of the company, with the policy," and that such change of

beneficiary should "take effect upon the endorsement of the same upon the policy." The insured, two days before his death, directed a change in the beneficiary, and mailed the policy with notice of the change to the home office of the company. The death occurred before the receipt of these papers by the company. Held that inasmuch as the company's approval or consent was not required to give effect to the change, and the assured had done everything required of him, the failure of the notice to reach the company until after the death of the insured, was immaterial.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

MESSRS. MACBETH & MAY, and Mr. JOHN F. TRUESDELL, for appellant.

Mr. PHILO P. TOLLES, Mr. THOMAS D. COBBEY, for appellee.

HURLBUT, J.

Action upon a life insurance policy by appellee (plaintiff below) against appellant (defendant). About January 1st, 1908, Mordaunt M. Lowther, husband of plaintiff, secured from defendant a twenty-year endowment policy upon his life, payable to plaintiff, his wife, in the event of his death prior to its maturity. The policy contained a clause reserving a right in the insured to revoke the appointment of beneficiary therein named and at any time while the policy was in force designate a new beneficiary with or without right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy, and that such change of beneficiary, if made, should "take effect upon the endorsement of the same on the policy by the company".

The husband died February 22nd, from the ef-

fects of a gunshot wound. Two days before his death he, in writing, exercised his right of revocation and changed the beneficiary from his wife, Bessie V. Lowther, to his sister and brother, Lulu G. and Robert E. Lowther, and mailed the policy, with a notice of the change, to the home office of the company. The company received the policy February 24th, and on February 27th endorsed thereon in writing the change of beneficiary above referred to, and thereupon mailed the same to said Lulu G. Lowther at Pittsburg, Pennsylvania.

Did the facts as heretofore related constitute a change of beneficiaries? The point of contention is sharply debated by counsel for the respective parties. Appellant relies upon *Denver Life Insurance Co. v. Crane*, 19 Colo. App. 191, and authorities cited, in support of the affirmative, while appellee asserts with vigor that the case of *Rollins v. McHatton*, 16 Colo. 203, entirely supports the negative.

In the *Crane* case one of the controlling questions before the court was: Did the beneficiary mentioned in the policy have such an interest therein as such as would entitle her to question a waiver of notice made to the company by the insured? The company was a mutual one, and the policy contained a clause to the effect that the insured might, without consent of the beneficiary, diminish the amount of his policy or appoint another beneficiary in place of the one named therein, subject to approval by the board of directors. The company contended that this clause was exclusively for the protection of the company; that the beneficiary had no vested interest in the policy; that her interest was only a contingent expectancy, therefore she could not be heard to ob-

ject to such waiver. The court of appeals adopted this theory and held that the insured, while living, had complete control over the policy and might waive any notice or right he might have possessed concerning the policy, regardless of the wishes of the beneficiary, and that his acts in that behalf were binding upon the beneficiary.

The *Rollins* case involved this same question, and in addition, a question as to whether or not a change of beneficiaries had been consummated by the acts of the insured who sought to effectuate such change. As to the first point, the supreme court reached an opposite conclusion to that reached by the court of appeals, and held that compliance with the clause in the policy prescribing the mode for effectuating a change of beneficiary was as necessary for the protection of the insured and beneficiary as for the company, and that the beneficiary could question the manner in which such change was attempted, and that such change would not be binding upon the beneficiary unless made in substantial conformity with the terms of the policy. The two cases are in conflict upon this point, and although both views are supported by authorities of high standing, we are concluded by the decision of our supreme court as expressed in the *Rollins* case, in so far as the same is applicable to the facts involved in the instant case. The court in the *Rollins* case further held that no attempt had been made by the insured to have the change of beneficiary entered on the record of the supreme secretary, nor did he in any way, by letter, orally, or otherwise, express to the society his desire to have such change made, in fact had wholly failed to comply with the requirements

of the policy in the attempt to change beneficiaries. The following quotation from that opinion states the views of the court, viz.:

“The resolution to substitute can be enforced in but one way, viz, ‘by change of beneficiary entered upon the record’, etc. It will not do to say that the entry upon the record is directory merely, or that it is of no special importance. This entry is an essential part of the substitution, and the change is incomplete until it is made (citing authorities). The delivery of the certificate to appellant by McHatton was no compliance with the mode prescribed for effectuating a change of beneficiary. While it may be indicative of the intent of McHatton at the time, it was not the method agreed upon for the declaration of that intent. We cannot accept the view that this provision was inserted in the certificate exclusively for the protection of the association. It is doubtless a matter of importance to such societies that their books show the changes in this respect, but it is more important to the assured that some record of the kind be kept, in order that his wishes in the premises may not, after his death, be defeated, and obviously the beneficiary is profoundly interested in having such definite and reliable evidence of his ownership. It would be an injurious precedent were we to hold that the designation of the change of beneficiary by *entry* upon the books of the company is not imperative,” citing: *Daniels v. Pratt*, 143 Mass. 216; *Holland v. Taylor*, 111 Ind. 121; *Stephenson v. Stephenson*, 64 Iowa 534; *Insurance Co. v. Miller*, 13 Bush (Ky.) 489.

Many other decisions of force adopt the rule here laid down, one of which is worthy of note, viz:

Supreme Conclave Royal Adelpia v. Capella et al.,
41 Fed. 1.

The *Rollins* opinion was founded upon the facts before the court, and as it was undisputed that no effort had ever been made by the beneficiary to have the policy delivered to the company, or have the change of beneficiary entered upon the records of the society, or to inform the company of his desire to have such change made, as required by the policy, it was there ruled that the change did not become effective. The following excerpt is taken from another part of the opinion, viz:

"Equity occasionally aids an attempted or incomplete change of beneficiary. If the assured has done his part towards perfecting the substitution, in accordance with the method prescribed, but, owing to circumstances over which he has no control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete—Bacon's Benefit Societies, etc., 309-310, and cases—but it is an essential prerequisite to the interposition of equity that the assured has in good faith attempted to comply with the prescribed mode of substitution. McHatton made no effort to do this. It does not appear that he communicated orally or in writing to the secretary or to any other officer of the association a desire to have the proceeds from the risk paid to his son, or that he otherwise sought to secure the proper entry in the association's books." See *Heydorf v. Conrack*, 7 Kan. App. 202; *Supreme Tent v. Altman*, (Mo.) 114 S. W. 1107; *Walsh v. Sovereign Camp*, (Mo.) 127 S. W. 645; *Association v. Kirgin*, 28 Mo. App. 80; *Mayer v. Association*, 2 N. Y. Supp. 79; *Kepler v. Supreme*

Lodge, 45 Hun. 274; *Cooley's Brief on Life Insurance*, vol. 4, p. 3769; *Berkely v. Harper*, 3 App. Cases, D. C. 308; *Relief Association v. Strode*, 103 Mo. App. 694; *McGowan v. Foresters*, 104 Wis. 173.

In the case at bar there can be no question but that everything required of him by the policy to the minutest detail was done by the insured, to consummate a change of beneficiaries, except that he failed to lodge or file the notice of change with the company at its home office, as he attempted to do. He wrote and mailed a letter to that office, accompanied by the policy. In the letter he clearly revoked the prior appointment of plaintiff as beneficiary and appointed his brother and sister as the substituted beneficiaries. There is no suggestion of mental weakness on his part, or of fraud or duress. He was dangerously wounded, and it is a fair presumption that at the time his mind was concerned with matters of serious moment. Everything he then did and requested was indicative of a solemn intention then and there to have the money payable under the policy go to his brother and sister, and not to his wife. The company received the letter and policy two days after the death of the insured, and endorsed the change on the policy and mailed it to one of the new beneficiaries. Such being the situation, was there a substantial compliance by the insured with the terms of the policy, notwithstanding its failure to reach the company in due course before his death? Let us turn to the language of the policy. That part material here reads as follows:

"The insured, if there be no existing assignments of the policy made as herein provided, may, while the policy is in force, designate a new bene-

ficiary with or without reserving right of revocation, by filing written notice thereof at the home office of the company, accompanied by the policy, for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the policy by the company."

It will be noticed that no consent of the company is required to consummate the change, nor is there any recital to the effect that such change of beneficiary shall not be valid until the notice and policy be so filed and endorsed, or until the company has consented to, or approved of, the same. We mention this at this time because of the fact that many cases cited in the briefs construe policies containing such recitals, and the courts appear to lay considerable stress thereon.

When Lowther died the letter and policy were well on the way to the home office of the company. Had they reached that office before his death the company was legally bound, under the contract, to file the same and endorse on the policy the change of beneficiaries as designated by him. It had no discretion to exercise in the premises. The company could not in the slightest degree question the revocation of the former beneficiary by the insured, nor the selection made by him of the substituted beneficiaries. By the terms of the policy the company had conferred on the insured an unconditional right to, at any time or place, revoke the appointment of the existing beneficiary and substitute another in her place. When the insured resolved in his mind to change the beneficiary from his wife to his sister and brother he was mortally wounded, and was two thousand miles from the home office, but he promptly

made use of the most reliable and expeditious agency known in order to place the policy in the hands of the company at the first possible moment. In the shadow of death he had solemnly registered his wish and desire to have the fund go to his sister and brother. His wishes should be respected, unless some clear, well-settled and imperative rule of law prevents. We do not think such obstacle exists. Had the company, when making this contract, reserved any right to itself to control, or finally pass upon, the actions of the insured in changing beneficiaries, we would be confronted with a different question. It could not have been within the contemplation of the parties to the contract of insurance when it was made that a revocation of one beneficiary and designation of another, made in writing, accompanied by the policy, deposited in the public mail for carriage to the company, during the lifetime of insured, should fail to become effective only because the insured should die before the notice and policy arrived at the office of the company in due course. Death intervening between the deposit of the notice in the mail and its full delivery at the home office may, and we think should, be regarded as one of the contingencies making it impossible to complete the change after all had been done that could be done by the insured, and that in such case, as said by Justice Helm in the *Rollins* case, equity will treat the substitution as complete. Therefore we think that under such circumstances and the facts of this case the failure of the letter to reach the company before the insured's death was immaterial. It appears to the court as illogical to hold that where the company was bound to give full force and credence

to the change, the *time* of indicating its willingness to do what it was obliged to do, willingly or unwillingly, is of controlling importance.

The clause in the policy, "such change shall take effect upon the endorsement of the same on the policy by the company", in view of the entire paragraph in which it is found, does not suggest to our mind a condition precedent to the consummation of the change of beneficiary, but rather a provision for protection against such possible oral or other changes by the insured of which the company has not received notice. In such case this clause would protect the company against liability as between contesting beneficiaries for the fund. The first change received and endorsed by it would be upheld, and the record thus made would likewise protect the true beneficiary and give effect to the insured's wishes. The receipt of the notice and policy by the company two days after insured's death, of which it had no knowledge, did not relieve it of the ministerial duty imposed by the terms of the contract, of filing and endorsing the same. There is in this case no question of waiver involved, as the company had no discretion in the premises.

We do not think the conclusions we have reached are in conflict with the *Rollins* case, or any other decision of our supreme court within our knowledge. The facts in that case are entirely dissimilar to those here considered. The court there only decided that the attempted change of beneficiary by the insured was ineffective for the reason that the conditions of the policy respecting the change had not been followed, nor had any effort been made by the insured to comply therewith. He had simply placed the pol-

icy in the hands of a third person, many years before his death and before his second marriage, with the oral declaration that he wanted his son to receive the fund in case of his death. He entirely ignored the requirements of the policy relative to changing the beneficiary. Some general language was used in the opinion not necessary to support its conclusions, but even as to such language there appears a strong intimation therein favoring the views of this court as herein expressed. However this may be, the supreme court, through Justice Campbell, has expressed itself upon the effect of general language used in opinions, in these words, viz:

"The rule is familiar that general language in an opinion is to be taken in connection with the facts of the particular case." *Halbour v. Cuenin*, 45 Colo. 507.

The conclusion we have reached is based upon the principle or rule announced in the *Rollins* case, *supra*, viz:

"Equity occasionally aids an attempted or incomplete change of beneficiary. If the assured has done his part towards perfecting the substitution, in accordance with the method prescribed, but, owing to circumstances over which he has no control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete—Bacons Benefit Societies, etc., 309-310, and cases—but it is an essential prerequisite to the interposition of equity that the assured has in good faith attempted to comply with the prescribed mode of substitution."

The case of *Knights of Maccabees v. Sackett*, 34 Mont. 367, appears to be the strongest case cited in

support of appellee's position. In that case the change of beneficiaries could only be made in pursuance of the by-laws of the association. The by-laws are not recited in the opinion, and we are unable to compare them with the contract before us. We do not know whether or not the by-laws, taken as a whole, were tantamount in letter and spirit to the requirements of this contract concerning change of beneficiaries. Even if they were, we are not inclined to follow that case or others holding the same views. In each of the other cases cited by appellee (list following) the facts are distinguishable from the case at bar, in that there was a failure on the part of the insured to pay the required fee; or the policy or contract contained a recital to the effect that a change of beneficiary by the insured should be void unless first entered on the records of the company; or consent of the company be first obtained; or notice of the change be first received; or other requirement of similar import and controlling effect, as construed by those courts. *Fink v. Fink*, 171 N. Y. 616; *Stringham v. Iowa Legion of Honor*, 72 Ia. 683; *Independent Foresters v. Keliher*, 36 Ore. 501; *Hamilton v. Arcanum*, 189 Pen. St. 273; *McLaughlin v. McLaughlin*, 104 Calif. 171; *Cousman v. Modern Woodmen*, 69 Neb. 710; *C. P. I. Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

Something has been said in the briefs suggesting a distinction between old line life insurance companies and fraternal societies when construing contracts of those corporations. We believe in some jurisdictions there is a tendency to recognize such distinction, but the weight of judicial authority appears to be the other way. However, it is the adopted

rule in this state that no such difference exists. In *Love v. Clune*, 24 Colo. 237, Justice Goddard, in passing on the question, used the following language:

“There is no inherent difference between mutual benefit associations and ordinary life insurance companies in regard to the right to change beneficiaries.”

In view of what has been heretofore said, the judgment will be reversed.

Reversed and Remanded.

WALLING, J., dissents.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3507.]

FEHRINGER, ADMINISTRATOR, V. MARTIN.

1. APPEALS—*Where An Appeal Lies*. Under Rev. Code, sec. 422, no appeal by the successful parties lay to the supreme court from a money judgment not involving a franchise or freehold. Recovering less than his demand, his remedy was by writ of error.
2. — *Where a Freehold Is Involved*. Where both parties agree that an absolute conveyance was intended as mere security, a decree declaring that the indebtedness so secured has been fully paid, and that the mortgage be released and discharged, does not involve a freehold, and no appeal lies, even though the creditor claims that the mortgage debt has not been discharged.
3. MORTGAGE—*A Mere Lien*. A mortgage of lands does not vest title in the mortgagee, but confers a mere lien. An absolute deed intended merely as security has no greater effect than a mortgage with a defeasance expressed.

Appeal from El Paso District Court. HON. W. S. MORRIS, Judge.

MR. WILLIAM C. ROBINSON, Messrs. THOMAS, BRYANT & MALBURN, for appellant.

No appearance for appellee.

WALLING, Judge.

Appellee brought this action in the district court against the appellant, as the administrator, and the sole heir at law of Otto Fehringer, deceased. The complaint alleged that the plaintiff (appellee here), in the lifetime of defendant's intestate, executed to the latter two promissory notes for the principal sum of two thousand and three thousand dollars respectively, and that, for the purpose of securing the payment of the two thousand dollar note, the plaintiff, at the same time, executed to said Otto Fehringer a warranty deed for the premises described in the complaint; that said deed was intended by both of the parties to be, and was, in fact, a mortgage to secure the payment of the note for the principal sum of \$2,000 above mentioned. It was further alleged that the plaintiff paid to Otto Fehringer, in his lifetime, the debt secured by the mortgage deed in full, and had further paid all of the note for the principal sum of \$3,000, except a balance of principal and interest amounting to \$570.75. The complaint alleged the tender to the defendant administrator of the sum of \$570.75, as the balance due on the three thousand dollar note, and prayed for the reconveyance or release of the mortgaged premises, the surrender of plaintiff's notes, for cancellation, and general relief. Demurrers were filed by the defendant, separately, as administrator and as heir at law, alleging that the court was without jurisdiction of the subject of the action, that the facts stated in the complaint were insufficient to constitute a cause of action, and that there was a misjoinder of parties defend-

ant. The demurrers were overruled, and an answer was filed by the defendant, as the administrator and sole heir at law of Otto Fehringer. The answer admitted that the deed described in the complaint was given as a mortgage security for the indebtedness of the plaintiff to defendant's intestate; but denied that the amount of the indebtedness secured thereby was as stated in the complaint, and denied that the secured indebtedness had been paid. It admitted that the defendant, as administrator of Otto's estate, held the two promissory notes described in the complaint, and alleged that not more than \$1,000 had been paid on the entire indebtedness represented by them. The answer further alleged that the warranty deed was in fact executed for the purpose of securing an indebtedness of plaintiff to defendant's intestate, amounting to a large sum, of which the two promissory notes represented a part, and upon which there remained unpaid the sum of \$4,100; and that the defendant was, and had been at all times since his appointment as administrator, ready and willing to execute to the plaintiff a proper release or reconveyance of the premises described in the complaint, upon the payment of the balance of the indebtedness secured thereby. Judgment was asked, on behalf of the defendant, as administrator, against the plaintiff, for the sum of \$4,100, and interest. The replication consisted of denials of the statements in the answer, which were at variance with the allegations of the complaint.

The issues were tried by a jury, who returned a special verdict to the effect that there was due from the plaintiff to the estate of Otto Fehringer, deceased, the sum of \$570.75, and that the indebtedness

secured by the deed given by the plaintiff to defendant's intestate had been fully paid. Thereafter, a judgment was entered in the cause, wherein it was found by the court that the deed mentioned in the pleadings was a mortgage, given to secure the payment of plaintiff's indebtedness, to the amount alleged in the complaint, and that the indebtedness secured had been paid in full; and it was decreed that "the said mortgage is hereby declared fully released and discharged as an encumbrance upon the title of the plaintiff to said described premises", etc. It was further therein adjudged that the defendant administrator recover of the plaintiff the sum of \$570.75, and that he have execution therefor; and that the plaintiff recover his costs of the defendant. From that judgment this appeal was prosecuted. No appearance has been made by the appellee, in the supreme court or in this court. The cause having been reached, in its order, for final determination, a motion was filed, on behalf of appellant, asking that it be remanded to the supreme court, the ground of the motion being that the cause relates to a freehold, in that it involves the title to the property described in the deed given by appellee to appellant's intestate, as hereinabove stated. The position of appellant's counsel is thus concisely stated in their brief accompanying the motion to remand: "An examination of appellee's complaint will show that the fee simple title to the property described therein stands in the heirs at law of one Otto Fehringer, deceased, by virtue of a deed executed by appellee and his wife to Otto Fehringer in his lifetime, which deed appellee asks to have canceled. It is quite apparent, therefore, that if appellee's contention is sustained,

the logical and necessary result will be that the heirs of Otto Fehringer will lose a freehold estate, and appellee will gain one." This does not seem to accurately state the nature of the controversy between the parties. By the allegations of the plaintiff's complaint, the deed mentioned was not intended to and did not convey a fee simple title to Otto Fehringer, but was a mortgage only. It is the settled law of this state that a mortgage does not vest title in the mortgagee, but creates a mere lien; and the fact that the mortgage is in the form of a deed absolute on its face does not change the rule, as it affects the mortgagee, and his representatives. *Mills' Ann. Code*, § 261; *Pueblo etc. Co. v. Beshoar*, 8 Colo. 32. It is likewise familiar law that, upon the death of the mortgagee, the mortgage, with the indebtedness secured, like other choses in action, becomes a personal asset in the hands of his administrator.

If issue had been taken by the defendant upon the allegation of the complaint that the deed to Otto Fehringer was in fact a mortgage, there would be room for the contention that the decision of the appeal would relate to a freehold, within the meaning of section six of the act under which this court was organized—chapter 107, session laws of 1911. But, as has been shown, the answer not only admitted that the deed in question was a mortgage, but insisted that it was so held by the defendant, as administrator, as security for the entire amount of the indebtedness claimed to be due from the plaintiff to the estate of Otto Fehringer, and for which judgment was prayed in the answer. No claim to the property described in the deed was asserted by the defendant, as heir at law. It has been held by this

court that the words "relates to a * freehold", as used in the sixth section of the act establishing the court, should be given the same construction as the like expression found in the section of the code of civil procedure providing for appeals to the supreme court. *Monte Vista Canal Co. v. Centennial etc. Co.*, 123 Pac. 831. The opinion of Judge King, in the case cited, contains a full review of decisions of the supreme court, which have construed the provisions of the code of civil procedure concerning appeals from judgments relating to freeholds. It is unnecessary to discuss those cases here; because it cannot be doubtful, upon this record, that the appellant was not deprived, by the judgment, of title to the real estate, since he never had or claimed title thereto. The fact that he, as administrator, claimed a lien, by way of mortgage, to secure the balance alleged to be due the intestate's estate, did not bring a freehold estate in controversy. *Hallett v. Alexander*, 50 Colo. 37.

We have been referred by counsel to the opinion of the supreme court of Illinois, in *Ducker v. Wear etc. Co.*, 145 Ill. 657, in which it was said: "A freehold is not only involved where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, but also where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. *Malear v. Hudgens*, 130 Ill. 225; *Sanford v. Kane*, 127 Id. 591."

The court, in the same opinion, referred approvingly to *Monroe v. Van Meter*, 100 Ill. 347, wherein it was held that "a freehold is always in-

volved in an action where the title to land is presented and in issue between the parties."

It may be observed here that our supreme court has upon several occasions ruled that the terms "relate to" and "involve" are synonymous in this connection. But it is hard to see how the Illinois cases cited can aid the contention of the appellant, inasmuch as there was no question of title in issue between the parties to this action, and none was determined by the judgment. It was agreed by the pleadings, in effect, that the title was in the plaintiff, the only matters in controversy being as to the amount of the indebtedness originally secured by the mortgage deed, whether such secured debt had been paid, and also the total indebtedness of the plaintiff to Otto Fehringer and the balance remaining due his estate on account thereof. It does not appear that the appeal falls in any of the classes of cases specified in the sixth section of the act establishing the court of appeals, and the motion to remand must be denied.

This conclusion necessarily leads to the matter of the final disposition of the cause. We cannot overlook the fact that the only judgment for money involved is that for \$570.75, in favor of the appellant. It has been uniformly held by the supreme court that a party cannot appeal from a judgment in his favor; and, if he is dissatisfied with such judgment, or has failed to secure all of the relief to which he claims to be entitled, his only remedy is by writ of error. *Hall v. Pay Rock Mining Co.*, 6 Colo. 81; *Harvey v. Travelers' Ins. Co.*, 18 Colo. 354; *Fischer v. Hanna*, 21 Colo. 9. The statute does not permit an appeal from a judgment for costs, which does not

relate to a franchise or freehold. *Johnston v. Eagle O. S. Co.*, 46 Colo. 182. There is no escaping the conclusion that the supreme court was without jurisdiction to entertain this appeal, and, consequently, there is none here. We can do nothing, in the circumstances, but order the dismissal of the appeal, in compliance with the rule of *Brady v. People*, 45 Colo. 364; *Johnston v. Eagle O. S. Co.*, *supra*, and *Denver etc. Co. v. Casady*, 50 Colo. 351. The appeal is dismissed for want of jurisdiction.

Dismissed.

CUNNINGHAM, Judge, having been of counsel, took no part in the decision of the case.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.

[No. 3844.]

LAFITTE v. SALISBURY.

1. JUDGMENTS—*Collateral Attack*. Bill to quiet title, the plaintiff claiming under a sale upon execution issued upon a judgment against the defendant in the equitable action. Jurisdiction of the subject matter, and of the person of the defendant, in the court rendering such judgment, being admitted, the judgment can not be questioned.

2. — *How Far Conclusive*. A bill to vacate a judgment and an execution sale of lands thereunder, for fraud in procuring the judgment is dismissed for want of equity. The decree is conclusive upon the plaintiff therein, as to all matters alleged in the bill, when the defendant brings an action to quiet the title derived under the execution sale. But other grounds of objection to the sale, though existing at the filing of such bill may be presented.

3. EXECUTION SALE—*Vacating—Inadequacy—Chilling the Sale*. Mere inadequacy in the price bid by the creditor at an execution sale is no ground to vacate the sale. Otherwise where fraud, or irregularity in the conduct of the sale prevents the obtaining of a fair price.

4. *APPEALS—Presumptions.* The court of review is not at liberty to assume that the exclusion of material and competent evidence was not injurious to the defeated party.

5. *CASES DISTINGUISHED.* *Fallon v. Worthington*, 13 Colo., 559, distinguished.

Error to Larimer District Court. HON. JOHN I.
MULLINS, Judge.

MR. CHAS. M. BICE, for Plaintiff in Error.

MR. GEORGE SALISBURY, for Defendant in Error.
Judgment reversed.

WALLING, J.

The principal action was brought in the district court by defendant in error, as plaintiff, against John A. Cross and the plaintiff in error, as defendants. The complaint contained the following allegations of facts: On January 8th, 1894, George Salisbury recovered a judgment against the defendant LaFitte, in the district court of Pueblo county, for \$3,130 and costs of suit, and on August 28th, 1903, execution issued on that judgment to defendant Cross, then sheriff of Larimer county. Cross, as sheriff, levied the writ upon the real estate described in the complaint, as the property of the defendant LaFitte, and, after due advertisement, sold the property at execution sale to said George Salisbury, who afterwards assigned the certificates of purchase to the plaintiff Susan R. Salisbury; and, after the statutory time for redeeming the property from the sale had elapsed, Cross, as sheriff, executed to said Susan what purported to be sheriff's deeds for the property sold, which were set out in full in the complaint. It was alleged that certain clerical errors occurring in the draft of these sheriff's deeds ought to

be corrected and the deeds reformed in certain particulars mentioned, so as to furnish perfect evidence of title in the plaintiff thereunder. It was also alleged that plaintiff was in possession of the premises sold at the execution sale described in the sheriff's deeds, and claimed title in fee to the premises by virtue of those deeds; that the defendant LaFitte claimed an interest therein adverse to the plaintiff, which claim of said defendant was without any right whatever, and that the latter had no estate, right, title or interest in any of the land described in the sheriff's deeds. The complaint prayed that the sheriff's deeds be reformed, that the defendant Cross, who was the sheriff of Larimer county when the deeds were executed, be required to execute corrected deeds to the plaintiff; and that any and every adverse claim of the defendant La Fitte to the property should be determined in the action, and the title of the plaintiff be quieted as against all such adverse claims. The defendant Cross made default.

The answer of the defendant LaFitte denied the allegations of the complaint, except as expressly admitted. The answer admitted that a judgment was rendered against her on January 8th, 1894, for \$3,130 and costs, and alleged that it was an attempt to revive a former judgment in favor of Henry Rups against the answering defendant. That allegation was followed by averments evidently intended to show fraud in procuring the Salisbury judgment, which were repeated in the "counter-claim" hereafter noticed. It was further alleged that the judgment was taken against her in the revival proceedings by default, because she was destitute of means to engage counsel to defend her, and that the pro-

ceedings were "void on their face, in that the summons therein purported to seek a recovery by Salisbury against this defendant, while the petition purported to seek a revival of the judgment." The first defense of the answer contained some other statements, which are utterly immaterial, and require no attention.

For a further and separate answer and counter-claim, the defendant LaFitte alleged that on the 8th day of January, 1894, George Salisbury commenced a proceeding to revive a judgment of Henry Rups against her, in the district court of Pueblo county, as pretended assignee thereof, "and obtained judgment therein in his own name for \$3,130 and costs against this defendant"; that Salisbury fraudulently pretended to the court that he was the assignee of the original judgment, and entitled to revive the same in his own name, but that in fact the Rups judgment was never assigned to Salisbury, and he had no authority to revive that judgment, either in his own name or in the name of Rups; and that the pretended assignment of the original judgment from Rups to Salisbury was a forgery. It was further stated that the defendant did not learn that Rups had never assigned his judgment to Salisbury, until the 9th day of September, 1903.

The further answer and counter-claim also set forth, in substance, that the real estate of the defendant described in the complaint was bid in at the execution sale thereof mentioned in the complaint, by George Salisbury, who caused the certificates of purchase to be made in the name of the plaintiff below, his wife, without consideration; that at the time of such sheriff's sale, the property was

worth \$20,000; and that Salisbury's attorney, who represented him at the sale, interfered with the bidders thereat, by making statements reflecting on the defendant's title, which were unfounded in fact, thereby inducing those who had offered more than was bid by Salisbury to withdraw from the bidding, and warned persons from bidding at the sale; and that, as the result of his language and conduct, Salisbury was enabled to bid in the entire property for the inadequate sum of \$5,500. The answer prayed that the complaint be dismissed, and that the levy upon and sale of defendant's property be set aside, etc.

The cause was tried before the court, who gave judgment for the plaintiff, wherein it was decreed: (1) That plaintiff was the owner in fee simple of the premises described in the complaint, and her title thereto was forever quieted against all claims, demands or pretensions of the defendant Marie LaFitte; (2) that the defendant Cross execute to the plaintiff a good and sufficient sheriff's deed to the premises, in accordance with the certificates of purchase for the same, or, if he failed to do so, the acting sheriff of Larimer county should execute and deliver such deed; (3) that the plaintiff recover her costs of the defendant Marie LaFitte.

At the trial the plaintiff introduced a large amount of documentary evidence, which it is not deemed necessary to review for the purposes of this decision. At the conclusion of plaintiff's case, defendant called George Salisbury to the witness stand, for cross-examination as an interested party. Thereupon plaintiff objected to the introduction of evi-

dence by defendant, on the ground of the insufficiency of the answer to state a defense. This objection was sustained by the court; and error is assigned here upon the exception to that ruling. The purposes of the proposed examination of the witness Salisbury cannot be determined from the record. But he was at least an adversary witness, if not in positive interest, and the objection was broadly to the introduction of evidence under the answer. As stated in the brief for defendant in error, it was in the nature of a demurrer *ore tenus*.

So far as the answer undertook to raise any issue with respect to the regularity of the judgment and proceedings of the district court of Pueblo county, or the execution under which the sale was made, it was plainly insufficient as a defense, and to that extent the ruling of the trial court was right. The judgment was not subject to impeachment in the present case, unless it appeared from the record of the judgment that it was wholly void; in which case, anything done or attempted under it or by its authority, by way of execution, or otherwise, would have been likewise null. The first defense of the answer under consideration admitted the judgment alleged in the complaint, and that admission was repeated by direct averment in the second answer or counterclaim. It cannot be successfully claimed that those positive admissions were nullified or withdrawn by other averments, because there was no allegation tending to show want of jurisdiction to render the judgment. The statement concerning the form of the summons in the proceeding for the revival of the Rups judgment was without meaning, and friv-

olous. It may not be out of place to remark, parenthetically, that certified copies of the proceedings and judgment of the district court of Pueblo county had been introduced by the plaintiff, in chief, from which it appeared that the plaintiff in error was personally served with summons, and also entered appearance, by filing an answer, and otherwise, and that default was ultimately entered against her because of the failure to file an amended answer within the time fixed by the court. These facts are interesting, although not controlling in the disposition of this writ of error.

Returning to the allegations of the answer in the case under review, respecting the judgment under which the execution sale was made, they amount at most to an attempt to allege, in a collateral action, supposed equitable grounds for attacking that judgment; and this was not permissible, whether or not the facts alleged would have supported an action, between proper parties, to annul the judgment and proceedings thereunder, for fraud in procuring the judgment. But those very allegations of supposed fraud in procuring Salisbury's judgment, and of the payment to Rups, and satisfaction by him of the original judgment, which had been revived by Salisbury, were before the supreme court for consideration in *LaFitte v. Salisbury*, 43 Colo. 248, and there held to be unavailable as the basis for assailing the execution sale here in question. The judgment under review in the last mentioned case was rendered in an action brought by the present plaintiff in error against George Salisbury, Henry Rups and Susan Salisbury, for the purpose of annulling the identical

judgment and sale now under consideration. The complaint of the plaintiff in error in that case contained substantially the same allegations, which are found in her answer here, except as will be herein noticed; and the supreme court held, affirming the judgment of the district court, that the allegations of the complaint were wholly insufficient to constitute a cause of action. Manifestly, that decision must be regarded as conclusive against the plaintiff in error, that the questions therein determined adversely to her could not have, in any manner, been again presented for litigation, in the present action.

However, all of the matters included in the present answer were not determined by the decision in 43rd Colorado, or necessarily concluded by the judgment affirmed thereby. The answer raised issues of fact, not involved or considered in the ruling upon the former complaint of the plaintiff in error. It denied generally the allegations of the complaint, except the judgment in favor of Salisbury, and was not, therefore, subject to a general demurrer. Moreover, it was alleged that the execution creditor, Salisbury, by his representative, fraudulently prevented competition at the sale, and by words and acts induced the withdrawal of bids larger than those offered by him, and by that means succeeded in bidding in the property for a small proportion of its actual value. It is true that inadequacy of the price bid did not alone furnish ground for setting aside the sale in equity; but the rule is equally well settled that where the property has been bid in by the execution creditor for a sum substantially less than its true value, and there are circumstances of fraud or

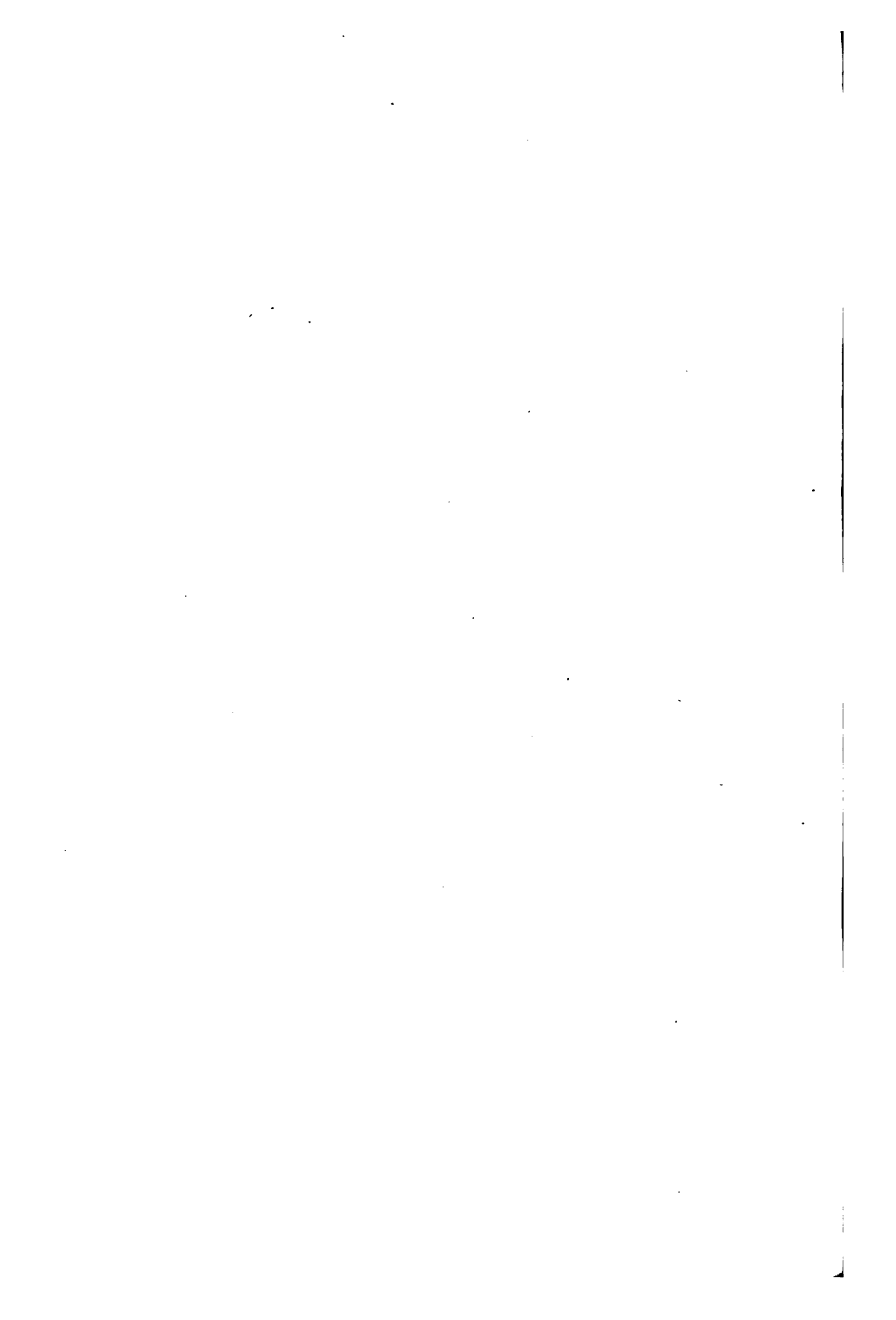
irregularity in the conduct of the sale, which prevented the property from being sold at a fair price, equity will give relief. 2 Freem. Ex. § 297; 17 Cyc. 1278. If the allegations of the answer were true, in this instance, the plaintiff, who, according to its averments, occupied the position of a mere volunteer, took the certificates of purchase subject to all of the equitable rights of the defendant as against the plaintiff's assignor. In the opinion in *LaFitte v. Salisbury*, *supra*, the court said (43 Colo., page 254): "Ordinarily, inadequacy of price paid is not sufficient cause for setting aside a judicial sale. *Conway v. John*, 14 Colo. 30. Generally, in addition, it must appear that there were such irregularities in connection with the sale, or such fraud practiced, as tended to prevent the property levied upon from being sold at a fairly adequate price. Nothing of this character appears in plaintiff's complaint." In that important particular, then, the complaint mentioned in the quotation differed from the answer here, inasmuch as the answer averred the fraud in the conduct of the sale, held to be essential to the sufficiency of the former complaint, in connection with the alleged inadequacy of the purchase price. Within the rule declared in the excerpt from the opinion of the supreme court above, we are of the opinion that the allegations of the answer were sufficient, as against the general objection made at the trial, to allow the defendant to introduce competent evidence of the alleged fraudulent suppression of competition at the sale, which prevented a sale of the property at a fairly adequate price, for the purpose of impeaching and setting aside the sale. This conclusion does not

seem to be successfully combatted by anything in the brief for defendant in error. The case of *Fallon v. Worthington*, 13 Colo. 559, offers no parallel to anything shown by the record before us, since it does not appear that the plaintiff in error derived any direct benefit or advantage from the alleged wrongful sale of her property, or otherwise acquiesced in the sale, so as to estop her from asserting its irregularity. We understand from exhibits in evidence on the part of the plaintiff, that the purchase price was applied as a credit on the Salisbury execution. Of course, if the sale were set aside, upon competent evidence justifying such a decree, the decree must necessarily contain such suitable orders and directions with respect to a resale of the property, as would fully protect the equitable rights of both the plaintiff and defendant. It is quite true that the defendant may not have been able to produce evidence, admissible under either the allegations of fraud practiced at the sale or under the general denial, which would have changed the result of the trial; nevertheless, we find that the court was in error in sustaining the general objection to the introduction of evidence under the answer, for the reasons which have been stated, and that error has been duly assigned upon the exception to such ruling, and the assignment is urged in the brief filed on behalf of the plaintiff in error. The error affected a substantial right of the defendant in the litigation, and we have no right to ignore it or to presume that prejudice did not result therefrom. In fact, the conclusion seems unavoidable that the judgment in the action below was the result of a one-sided trial.

By reason of the error indicated, it is ordered that the judgment is reversed, and the case is remanded for further proceedings consistent with the opinion of this court.

Reversed.

Decided July 8, A. D. 1912. Rehearing denied October 14, A. D. 1912.



INDEX

AGREED CASE. See **EVIDENCE.**

APPEALS.

1. *Where an Appeal Lies—Freehold Involved.*—In an action in which lands are attached judgment in damages is given in favor of an intervenor claiming title to the lands. The freehold is not involved. *Scheerem v. Stramann*, 24 Colo. 111, followed. —*Reyer v. Teare*, 172.

A freehold is never involved within the meaning of the statute conferring jurisdiction to review a judgment on appeal, unless such judgment necessarily deprives one of a freehold, or confers it upon another. The actual effect of the judgment in the particular case is the test.—*Monte Vista Co. v. Centennial Co.*, 364.

Where an irrigating company petitioned for the right to change the point of diversion of the water to which it was entitled, admitting the freehold of certain other irrigating companies, protestants, and the decree granted accordingly, in no manner assumed to impair or diminish in quantity the property of any of those objecting, but declared that no right of the respondents would be injuriously affected, held that the freehold was not involved.—*Id.*

And a freehold was held not involved in an appeal by certain shareholders in the petitioning company where the only question was whether the conditions imposed by the decree were sufficient for their protection.—*Id.*

In an appeal from a decree authorizing an irrigating company to change the place of diversion of the waters to which it was entitled the respondents challenged the validity or sufficiency of a deed under which the petitioner claimed title to a certain ditch and water right. Neither of these were claimed by any of the appellants, and the title being in issue only incidentally, it was held that no freehold was thus involved. A motion to remand the cause was, as to its other features, ruled by the judgment in *Monte Vista Company v. Centennial Company*, ante.—*Monte Vista Co. v. San Luis Co.*, 375.

An action seeking to enjoin a cloud upon the title to lands does not involve the freehold. No appeal lies from a decree in such cause.—*Casserleigh v. Spar Co.*, 426.

Under Rev. Code, sec. 422, no appeal by the successful parties

APPEALS—Continued.

lay to the supreme court from a money judgment not involving a franchise or freehold. Recovering less than his demand, his remedy was by writ of error.—*Fehringer v. Martin*, 634.

Where both parties agree that an absolute conveyance was intended as mere security, a decree declaring that the indebtedness so secured has been fully paid, and that the mortgage be released and discharged, does not involve a freehold, and no appeal lies, even though the creditor claims that the mortgage debt has not been discharged.—*Id.*, 634.

2. *Where No Appeal Lies.*—An appeal in a case not appealable dismissed without prejudice, neither party, after notice, suggesting any disposition of the cause.—*Knudtson v. Pitcher*, 188.

Entry as Writ of Error—Limitation—General Appearance—Effect.—By general appearance in an appeal, and joining issue on the merits even after the lapse of the three years allowed by the statute (Mills' Code, sec 401, Rev. Code 1908, sec. 436), within which to sue out a writ of error the appellee waives the statutory limitation. Where application is made to enter the cause as a writ of error, appellee will not be heard to urge the lapse of the statutory appeal.—*Western Co. v. Golden*, 209; *Colorado Co. v. Rocky Mountain Bank*, 237.

An appeal transferred from the supreme court to this court, in a cause in which no appeal lay to the former court, will, where no appearance has been entered for the appellee, be dismissed. The transfer of the cause does not affect its status.—*Colorado Springs Co. v. Nugent*, 381; *Fehringer v. Martin*, 634.

In an appeal to the supreme court in a cause where no appeal was allowed by law, the appellee appeared and filed his brief and the cause was ready for final hearing. In this condition it was transferred to this court. On motion to dismiss, the appeal was docketed as a writ of error, under sec. 423, Rev. Code.—*Hendrie v. Acorn Co.*, 417.

3. *Remand—Freehold Involved.*—An appeal from the district court, in a will contest, was transferred from the supreme court to this court. On motion to remand it appeared that substantially all the property of the testator consisted of an interest in the unsettled estate of a brother. Inasmuch as it did not appear that the estate of the deceased brother was solvent, nor but that resort to his realty might be necessary to discharge his liabilities, so that no share of the land of the deceased brother would ever pass to the testator, or those claiming under him, it was held that a freehold was not necessarily involved.—*Burnham v. Grant*, 506.

APPEALS—Continued.

Remand—Amount in Controversy.—On motion to remand an appeal transferred from the supreme court to this court, the reason assigned being that the judgment amounts to more than \$5,000 exclusive of costs, the record presented no finding of the value involved, nor any testimony upon the point save the opinion of one witness, not supported by satisfactory reasons. The motion was denied and the court expressed the opinion that whoever would claim a right or benefit dependent entirely upon the values involved must see to it that the trial court makes a specific finding, and renders a judgment accordingly.—*Burnham v. Grant*, 506.

— That the clerk of the court of appeals is one of the appellees and the presiding judge one of the attorneys for the appellees is no ground to remand the appeal.—*Id.*, 506.

4. *Separate—Consolidation of.*—The action of the supreme court in consolidating appeals, while pending in that court, will in the court of appeals be regarded as final.—*Great Western Co. v. Parker*, 18.

5. *Transcript—Affidavit to Supplement.*—The certificate to the transcript of record sent up from the trial court is not to be supplemented by an affidavit showing that a paper not embodied in the transcript was in fact certified to this court by the clerk of the trial court.—*Jewel v. Sals*, 377.

Where complaint is made of the denial of instructions all those given must appear in the transcript.—*Jewel v. Sals*, 526.

6. *Construction of What Appears in Record.*—The construction of the pleadings, affidavits and other documents appearing in the record of the trial court is for the court of review. The construction of the court below is not controlling.—*Empire Co. v. Mason*, 616.

7. *Who May Assign Error.*—One who shows no title to lands will not be heard to complain of a decree quieting title in his adversary.—*Empire Co. v. Herrick*, 394.

8. *Errors Not Argued.*—The rule that the court will not consider the sufficiency of the evidence where the bill of exceptions omits important documents used at the trial, e. g., plats of the ground in controversy; and the other rule that the court will not consider errors which are not discussed by counsel, are not inflexible. The substantial rights of the parties are not to be sacrificed to the inadvertencies or omissions of counsel.

Error in an instruction highly prejudicial to defendant considered, though counsel had entirely failed to call attention to it.—*King Solomon Co. v. Mary Verna Co.*, 528.

APPEALS—Continued.

9. *Harmless Error*.—An order allowing a plaintiff to "re-file" his complaint as the basis of a renewed effort to obtain service of process upon a defendant, after such service, once attempted, has been quashed, is irregular; but the error affecting no substantial right is harmless.—*Toll v. Cobby*, 244.

Appellant will not be heard to complain of the admission of testimony by which he can in no event have suffered prejudice.—*Empire Co. v. Howell*, 389.

Errors not effecting the substantial rights of parties are to be disregarded. Acts 1911 c. 6, sec. 20.—*Empire Co. v. Herrick*, 394.

e. g., where, in a bill to quiet title, the plaintiff avers title in fee and proves only an equity, defendant showing no title.—*Empire Co. v. Howell*, 584.

A decree vacating a prior decree which is a mere nullity is not prejudicial, even if erroneous.—*Lougee v. Beene*, 603.

10. *Presumptions*.—Where the instructions upon the controlling issue are in direct conflict, and the evidence in the record is such that it is impossible to say that the jury were not misled, prejudice will be presumed.—*Great Western etc. Co. v. Parker*, 18.

Where the evidence heard in the court below is not set out in the record sent to this court, the findings below are conclusive as to the facts.—*Webermeier v. White*, 165.

Where there is no bill of exceptions it will be presumed that the evidence sustained the findings and judgment, provided that under any condition of proofs the judgment is within the allegations of the complaint.—*Price v. Kit Carson County*, 315; *Empire Co. v. Chapin*, 538.

The court of review is not at liberty to assume that the exclusion of material and competent evidence was not injurious to the defeated party.—*La Fitte v. Salisbury*, 641.

11. *Questions Not Presented Below*, will not be considered.—*Salisbury v. La Fitte*, 90.

Defective findings are waived unless at the time of the trial attention is called to the defect, and a more full and complete finding requested.—*Pace v. Cline*, 254.

12. *Verdict on Sufficient Evidence*, binds the court of review. The evidence will be viewed in the light most favorable to the successful party.—*Colorado etc. Co. v. Breniman*, 1; *Sisters of Charity v. Burke*, 230.

Verdict on Conflicting Evidence, is conclusive, if no error is discovered in the admission or exclusion of evidence or the

APPEALS—Continued.

charge of the court.—*Shollne v. Harris*, 63; *Frantz Stores Co. v. Wight*, 170.

13. *Abstract*.—Where the printed abstract of the record fails to show the date of the institution of the suit a plea of the statute of limitations will not be considered.—*Price v. Kit Carson County*, 315.

The privilege granted by rule 6 of the court to the appellee, to file a supplemental abstract, is not to be construed as absolving the appellant from the duty to observe the requirements of rule 5. Upon motion to dismiss an appeal for manifest defects in the abstract, it appearing that the defects were not due to any improper motive, the appellant was allowed to file a supplement, remedying such defects, within a day specified.—*Reyer v. Teare*, 172.

14. *Briefs*.—Errors not discussed in the brief of the complaining party will not be considered.—*Bloomer v. Jones*, 404.

15. *Practice—Withdrawing Bill of Exceptions*.—It seems that where what appears to be the appellant's bill of exceptions, but without attestation of the judge of the court below, is embodied in the transcript, the same may on motion be withdrawn for amendment. But where the appellant's bill of exceptions was not tendered to the judge below until after the lapse of the time allowed to file it, and it was then withdrawn for submission to the attorneys of the appellee, and under a date three months later it bore their approval but was never allowed or signed by the judge, nor certified to this court by the clerk below, it was stricken off on motion, without prejudice to appellant's right to apply to the court below for further action. Leave was also given to withdraw the transcript for a period named, and a further period was allowed to appellant to apply for leave to file a supplemental transcript.—*Jewel v. Sais*, 377.

16. *Entire Judgment Against Two Erroneous as to One*, will be reversed as to both.—*Salisbury v. La Fitte*, 90.

17. *Law of Case*.—The opinion announced upon the first appeal, the facts being the same upon a second trial, is the law of the case upon a second appeal.—*Herr v. Graden*, 511.

18. *Judgment*.—The judgment being excessive in amount was reversed, the costs of the appeal taxed to the appellee with directions to the court below to enter judgment for the proper sum.—*Price v. Kit Carson County*, 315.

No question being presented which could be considered by the court, the judgment of the trial court was affirmed.—*Jewel v. Sais*, 526.

APPEALS—Continued.

A decree vacating tax deeds containing several parcels of land modified so as to limit its effect in this particular to the lands described in the complaint.—*Empire Co. v. Howell*, 584.

ASSUMPSIT.

QUANTRUM MERUIT. See **CONTRACTS.**

ATTACHMENT.

What May Be Attached.—Equitable interest of non-resident, in corporate stock held for his benefit, by another.—*Toll v. Cobbey*, 244.

ATTORNEY.

Duty to Direct Officer as to Levy.—The attorney controlling an execution owes to his client the duty to give the officer to whom the writ is committed proper directions.—*Victor Co. v. Roerig*, 257.

But even where a levy upon the lands where the execution defendant is residing is contemplated, such attorney is under no duty to the defendant to notify him of the intended levy.—*Id.*

And the attorney's knowledge of the failure of the officer to give such notice cannot be imputed to the purchaser at the sale who is other than the plaintiff in execution.—*Id.*

AUTO CARS. See **NEGLIGENCE.****BANKS.**

1. *Insolvent—Liability of Stockholders—How Enforced.*—Prior to the banking act of 1907 (Laws 1907, c. 111, Rev. Stat., c. 11), the individual liability of stockholders, in insolvent banking corporations, was enforced by a suit in equity, by or on behalf of all the creditors, against all the stockholders.

The court might lawfully proceed to judgment against all stockholders served or appearing, retaining and continuing the cause as against those of whom jurisdiction had not been acquired, for the purpose of proceeding against them or their property.—*Toll v. Cobbey*, 244.

2. — *Equitable Owner of Stock—Liability.*—It seems that the equitable owner of shares standing upon the books of the bank in the name of another may be charged.—*Id.*, 244.

BILL OF EXCEPTIONS.

1. *When Necessary.*—Error alleged upon instructions given will not be considered where no exception thereto was saved.—*Ward v. Atkinson*, 134.

Where, in an action to quiet title to lands, the plaintiff de-

BILL OF EXCEPTIONS—Continued.

raigns title under a sale assumed to be made pursuant to the power of sale contained in a trust deed, and the bill of exceptions fails to set forth either the deed of trust or the trustee's deed thereunder, and neither is elsewhere found in the record, it will be assumed that these documents were properly admitted in evidence, without evidence allunde of compliance with the powers of the deed of trust.

A stipulation of counsel that the papers may be omitted from the bill of exceptions does not affect the question.—*Bloomer v. Jones*, 404.

2. *Requisites.*—A bill of exceptions taken in the trial of a cause which involves a question of boundaries should set forth the plats which were used and referred to in the trial court, even though the ground in contention is fully described by metes and bounds.—*King Solomon Co. v. Mary Verna Co.*, 528.

3. *Failure of Party to Comply With the Orders of the Court.*—Where the defeated party fails to comply with the orders of the court as to the presentation of his bill of exceptions the court of review will not require the judge of the trial court to authenticate such bill of exceptions.—*Jewel v. Sais*, 526.

CASES OVERRULED, EXPLAINED OR DISTINGUISHED.

Cases Overruled, Explained, or Distinguished.—*Stephens v. Clay*, 17 Colo., 489, explained.—*Empire Co. v. Howell*, 584.

Elkton Co. v. Sullivan, 41 Colo. 241; *Denver Co. v. Walters*, 39 Colo., 301; distinguished.—*Colorado Springs Co. v. Simmons*, 303.

Wolfe v. Mueller, 46 Colo., 339, explained and distinguished.—*Deutsch v. Rohlfing*, 543.

Fallon v. Worthington, 13 Colo., 559, distinguished.—*La Fitte v. Salisbury*, 90, 641.

COMMON CARRIERS.

1. *Who Are.*—Railroad companies are common carriers of live stock.—*Colorado etc. Co. v. Breniman*, 1.

2. — *Liability of.*—The carrier is not responsible, in that capacity, until the goods have been delivered to him, for, and in condition for, immediate shipment and transportation, requiring no further action, or direction from the consignor, and have been accepted by the carrier. Upon such delivery and acceptance the liability of the carrier commences, and delay in putting the goods in transit, no matter for what cause or for how long, is immaterial. If a loss occurs, not occasioned by the act of God or

COMMON CARRIERS—Continued.

the public enemy, the carrier is liable.—*Colorado etc. Co. v. Breniman*, 1.

3. — *Delivery to Carrier—Acceptance.*—Sending the freight to the place where the carrier is accustomed to receive freight, accompanied with notice that it is there for transportation, is a delivery, and may be sufficient to bind the carrier, as such, in the absence of objection or refusal to accept the same for immediate transportation. Formal acceptance is not required.—*Colorado etc. Co. v. Breniman*, 1.

4. — *Carrier of Live Stock—Duty.*—A railroad company carrying live stock is under duty to provide good and sufficient pens for receiving, loading and unloading live stock, not only at the station of receipt and delivery, but where stock *en route* are to be fed, or where they are delayed; and it is liable for losses occasioned by its failure to provide such facilities.

The liability is the same, whether the railway company maintains these facilities, or employs another to discharge their duty. or adopts the yards and pens of another as a part of its system.—*Colorado etc. Co. v. Breniman*, 1.

5. — *Contract Limiting Carrier's Liability*, is without effect where executed after the defaults which occasioned the loss complained of, no purpose to give it retrospective effect appearing.—*Colorado etc. Co. v. Breniman*, 1.

6. — *Contract Construed.*—The contract pleaded by the railway company in defense to an action for losses of live stock attributed to its defaults provided that "claims for loss or damage from any source shall be presented within ten days from the date of unloading said stock at destination." Held unreasonable to apply this provision to losses or damage occasioned by the railway company's defaults prior to its execution.—*Id.*

A clause in the bill of lading waiving and releasing all causes of action under any prior verbal or written contract is unreasonable and void.—*Id.*

CONSTITUTIONAL LAW.

Sec. 15 of art. XIV of the Constitution was not self-executing. Legislation was required to give it effect.—*Glaister v. Kit Carson County*, 326.

Article XX—Effect.—Immediately on the taking effect of article XX of the constitution, the power to grant franchises to occupy the streets, alleys or public places of the City of Denver was transferred from the city council to the qualified tax paying electors of the new municipality.

CONSTITUTIONAL LAW—Continued.

An ordinance of the city council adopted subsequent to the constitutional amendment, and prior to the adoption of the charter thereunder, granting to a railway company the right to occupy certain streets and alleys, was without effect, either as a grant or as a mere permit or license; it conferred no right whatever.—*Ward v. Colorado Eastern Co.*, 332.

Particular Statutes.—The statute providing that the suicide of the holder of a life policy whether voluntary or not, shall not be a defense to an action upon the policy (Laws 1903, c. 119) is not in contravention of any provision of the state or federal constitution.—*Modern Brotherhood v. Lock*, 409.

CONTINUANCE.

1. *Affidavit.*—An affidavit to support an application for the continuance of a cause on account of the absence of a witness should ordinarily be made by the party himself rather than by his attorney. If the party himself is unable to make the affidavit the reason of his inability should be made to appear. The affidavit must show the whereabouts of the witness, to what he would testify if present, and due diligence to procure his attendance or his deposition. If to excuse the failure to secure his deposition a letter of the witness promising to attend is relied upon, the letter should be presented.—*Ward v. Atkinson*, 134.

2. — *Prior Application—Stipulation to Admit Testimony.*—A trial and verdict for the opposite party, in the county court after a similar application upon the same ground, showing the testimony expected of the witness, and met by a stipulation that the witness would so testify if present, is ground to deny the application, when renewed upon appeal to the district court, no attempt to secure the deposition of the witness in the meantime appearing.—*Ward v. Atkinson*, 134.

3. — *Length of Continuance Applied For.*—It seems that under certain conditions, e. g., where the cause had been tried in the county court, and appealed to the district court, the length of time for which delay was requested may enter into the question of whether there was error in denying the application.—*Ward v. Atkinson*, 134.

CONTRACTS.

1. *Assent.*—One who has entered into an agreement in writing for an exchange of lands, after full examination of the paper and days of deliberation, will not, as against the broker who effected the change and sues for his commissions, be heard to say

CONTRACTS—Continued.

that he was not satisfied with the exchange, no substantial defect appearing in the title to the lands which he was to receive, even though he subscribed the writing upon the express condition that the broker should not receive the commission unless he, the contracting party, should be fully satisfied with the exchange.—*Sholine v. Harris*, 63.

2. — *Modification*.—A niece enters into the service of her uncle as his housekeeper. In her action against his estate for the value of her services it was contended that by her agreement, she was to remain with him during his life time, and that she had broken her agreement by contracting marriage and quitting his household before his death. But it appearing that the uncle had consented to the marriage, and thereafter as well as before had frequently expressed an intention to reward his niece, this was held to evidence a modification of the contract by mutual agreement.—*Norton's Estate v. McAlister*, 293.

3. *Validity—Who May Assail*.—Certain premises were occupied by husband and wife as a homestead. The husband conveyed to the wife, and the wife to a third person who executed to her a bond for a deed. She recorded this bond and entered upon the margin of the record a claim of the homestead right, under the statute. A creditor of the husband levied upon the premises, claiming that the conveyance of husband to wife was fraudulent, and that of the wife to the third person intended as security, and in effect only a mortgage, and the bond for reconveyance no more than a defeasance.

Held, that the judgment creditor of the husband, not being a party to the transaction between the wife and the one to whom she conveyed, nor privy to it, nor a creditor of either of the parties thereto, should not be heard to raise question as to the effect of the bond to reconvey, as to whether it was, in law, an agreement to sell, or a mere mortgage defeasance.—*Brooks v. Black*, 49.

4. *Construction*.—It seems that the interpretation of a contract is for the court, even though the contract be entirely by parol.—*Bullock v. Lewis*, 449.

A contract should be construed as a whole and in the light of known physical facts concerning the matter affected by the agreement.—*Animas Co. v. Smallwood*, 476.

— *Reasonable time*, depends upon the nature of the subject matter of the transaction, e. g., in the case of a transaction in mining stocks, the fluctuating and uncertain value of such investments is to be considered.

CONTRACTS—Continued.

The question is for the jury under appropriate instructions.—*Bullock v. Lewis*, 449.

— *Conduct of Parties*.—The conduct of the parties to a contract, while engaged in its performance, before controversy arises, is the best indication of what the parties intended thereby.—*Animas Co. v. Smallwood*, 476.

5. *Construed—Building Contract—Written Order for Extras*.—The contractor for the installation of a steam heating plant, at the request of one representing the owner, furnishes appliances not specified in the written contract for the work. The owner after they are furnished and put in agrees to pay first cost therefor, and the cost is arrived at by mutual agreement. The contractor is entitled to a lien for such cost price, though the contract stipulates that no extras shall be charged for unless upon written order from the superintendent, or a previous adjustment of the amount to be paid therefor.—*Sisters of Charity v. Burke*, 230.

Promise by an aged and infirm gentleman to his niece, who at his request has assumed the position of his housekeeper, that he will convey certain real estate to her, there being no agreement that it shall be in full satisfaction of the services to be rendered by her, is no bar to an action for the value of such service.—*Norton's Estate v. McAlister*, 293.

Plaintiff, through the defendant, a stock broker, purchased stock in a mining corporation. The purchase was made upon the broker's recommendation, and upon his promise, as alleged, that he "would see her out with her money and good interest." Held that the contract was one of indemnity; that the broker's liability depended upon the purchaser's sustaining loss by depreciation of the stock, or by its failure to so advance that she would receive the equivalent of interest upon her investment; that in order to a recovery plaintiff must show a loss; and that her recovery would be measured by the difference between the amount paid for the stock and its highest value within a reasonable time after the purchase, less by any dividends received; that plaintiff was entitled to a reasonable time after the purchase, within which to determine whether she would then sell or wait for an advance; and that the failure of the plaintiff to avail herself of opportunities to realize upon the investment within a reasonable time, might be a complete defense to her action.—*Bullock v. Lewis*, 449.

A land owner being entitled to four cubic feet of water per second of time, granted to an irrigating company a right of way

CONTRACTS—Continued.

over his land, along the line of his ditch, the company agreeing to enlarge, maintain, and operate the ditch "in such manner that at all times * * * at least four cubic feet of water will run through the same upon the land" * * * and to deliver "during all such time, * * * upon the land * * * four cubic feet of water per second of time * * * at such places upon said land," not exceeding eleven in number, as the land owner should designate, and from boxes of such capacity as the land owner might prescribe, provided the total capacity of all the boxes should not exceed four cubic feet per second of time, and that the land owner should have the right, at all times, to open and close the boxes as he might desire. The company accordingly constructed and placed ten boxes in the ditch, at places designated or consented to by the land owner, and the same were operated and used for several years. By reason of the broken and uneven surface of the land it was necessary, in order to properly irrigate it, that the specified number of boxes should be set and maintained. *Held* that it was manifest from the terms used that the land owner was not intending to relinquish any right or privilege which he then enjoyed; that the boxes must be of such size as to give a head, and permit the passage of a sufficient volume of water to perform efficient service; that it was not a reasonable construction of the contract that the land owner should be required to use all of the boxes at one time; that he was not to be confined to boxes so small that the total capacity would be only four cubic feet per second; that he was entitled to enjoy at all times four cubic feet of water per second of time, through such of the boxes as he might elect to use, and the boxes must be of such size as to enable him to draw the specified volume of water through any part of them.—*Animas Co. v. Smallwood*, 476.

The International Improvement Company, defendant, issued to plaintiff its bond agreeing to pay him a sum specified at a future date named, subject, among others, to the privilege and condition (1) that the bond might "apply on the purchase of real estate for sale by the company, subject to its regular selling conditions;" (4) That after a certain time specified the holder "may borrow 75% of the amount paid in, with bond to maturity by complying with its conditions," and (11) "This bond being the contract between the owner, and the corporation, the owner is not liable for any obligations of the company."

Held that, in view of the fact that the name assumed by the corporation was not in compliance with the statute (3 Mills

CONTRACTS—Continued.

Stat., sec. 280, Rev. Stat., sec. 951), and in view of the provisions of the eleventh privilege and condition, all possibility of the mutual rights and obligations which obtain between Building & Loan Associations and their members, was excluded; that plaintiff suing for the failure of the company to make a loan as stipulated by the fourth condition was not required to show that the corporation had on hand funds which could lawfully be applied to such loan; that the plaintiff was not a member of the association; that the phrase "may borrow" in condition four, did not leave it optional with the company to make or refuse the loan; that the holder of the bond had a clear right to the loan, and it was the clear obligation of the defendant to make it.—*International Co. v. Wagner*, 489.

See DEED OF TRUST.

6. *Non Performance—Effect.*—A party is not obligated by any feature of a contract which the other party thereto has failed to perform.—*Norton's Estate v. McAister*, 293.

Agreement by uncle to vest his niece with certain real estate, either by conveyance or will, in consideration of personal services rendered to him. He dies without performing the contract. The niece may recover against his estate the value of her services.—*Norton's Estate v. McAister*, 293.

7. — *Waiver of Performance.*—The parties to a contract may waive strict performance thereof.—*Sholine v. Harris*, 63.

CONVEYANCES.

Mistake in Description.—The deed of a mining claim referring to the location certificate gave an erroneous reference to the place of the record. Held that evidence to explain this mistake should be introduced; though it was held that the admission of the deed without such explanation was not error.—*King Solomon Co. v. Mary Verna Co.*, 528.

CORPORATIONS.

1. *Name.*—The statute providing that certain words "shall form a part of the corporate name" of each of a certain class of corporations, a corporation which adopts a name not containing the statutory words will not be regarded as belonging to the particular class required to be so designated.—*International Co. v. Wagner*, 489.

2. *Liability for Predecessor.*—That a corporation is formed with the purpose, among other things, to take over the properties of another and conduct the same business or enterprise, and that it does actually acquire all the properties of such former

APPEALS—Continued.

A decree vacating tax deeds containing several parcels of land modified so as to limit its effect in this particular to the lands described in the complaint.—*Empire Co. v. Howell*, 584.

ASSUMPSIT.

QUANTRUM MERUIT. See **CONTRACTS.**

ATTACHMENT.

What May Be Attached.—Equitable interest of non-resident, in corporate stock held for his benefit, by another.—*Toll v. Cobbey*, 244.

ATTORNEY.

Duty to Direct Officer as to Levy.—The attorney controlling an execution owes to his client the duty to give the officer to whom the writ is committed proper directions.—*Victor Co. v. Roerig*, 257.

But even where a levy upon the lands where the execution defendant is residing is contemplated, such attorney is under no duty to the defendant to notify him of the intended levy.—*Id.*

And the attorney's knowledge of the failure of the officer to give such notice cannot be imputed to the purchaser at the sale who is other than the plaintiff in execution.—*Id.*

AUTO CARS. See **NEGLIGENCE.**

BANKS.

1. *Insolvent—Liability of Stockholders—How Enforced.*—Prior to the banking act of 1907 (Laws 1907, c. 111, Rev. Stat., c. 11), the individual liability of stockholders, in insolvent banking corporations, was enforced by a suit in equity, by or on behalf of all the creditors, against all the stockholders.

The court might lawfully proceed to judgment against all stockholders served or appearing, retaining and continuing the cause as against those of whom jurisdiction had not been acquired, for the purpose of proceeding against them or their property.—*Toll v. Cobbey*, 244.

2. — *Equitable Owner of Stock—Liability.*—It seems that the equitable owner of shares standing upon the books of the bank in the name of another may be charged.—*Id.*, 244.

BILL OF EXCEPTIONS.

1. *When Necessary.*—Error alleged upon instructions given will not be considered where no exception thereto was saved.—*Ward v. Atkinson*, 134.

Where, in an action to quiet title to lands, the plaintiff de-

BILL OF EXCEPTIONS—Continued.

raigns title under a sale assumed to be made pursuant to the power of sale contained in a trust deed, and the bill of exceptions fails to set forth either the deed of trust or the trustee's deed thereunder, and neither is elsewhere found in the record, it will be assumed that these documents were properly admitted in evidence, without evidence aliunde of compliance with the powers of the deed of trust.

A stipulation of counsel that the papers may be omitted from the bill of exceptions does not affect the question.—*Bloomer v. Jones*, 404.

2. *Requisites.*—A bill of exceptions taken in the trial of a cause which involves a question of boundaries should set forth the plats which were used and referred to in the trial court, even though the ground in contention is fully described by metes and bounds.—*King Solomon Co. v. Mary Verna Co.*, 528.

3. *Failure of Party to Comply With the Orders of the Court.*—Where the defeated party fails to comply with the orders of the court as to the presentation of his bill of exceptions the court of review will not require the judge of the trial court to authenticate such bill of exceptions.—*Jewel v. Sals*, 526.

CASES OVERRULED, EXPLAINED OR DISTINGUISHED.

Cases Overruled, Explained, or Distinguished.—*Stephens v. Clay*, 17 Colo., 489, explained.—*Empire Co. v. Howell*, 584.

Elkton Co. v. Sullivan, 41 Colo. 241; *Denver Co. v. Walters*, 39 Colo., 301; distinguished.—*Colorado Springs Co. v. Simmons*, 303.

Wolfe v. Mueller, 46 Colo., 339, explained and distinguished.—*Deutsch v. Rohlfing*, 543.

Fallon v. Worthington, 13 Colo., 559, distinguished.—*La Fitte v. Salisbury*, 90, 641.

COMMON CARRIERS.

1. *Who Are.*—Railroad companies are common carriers of live stock.—*Colorado etc. Co. v. Breniman*, 1.

2. — *Liability of.*—The carrier is not responsible, in that capacity, until the goods have been delivered to him, for, and in condition for, immediate shipment and transportation, requiring no further action, or direction from the consignor, and have been accepted by the carrier. Upon such delivery and acceptance the liability of the carrier commences, and delay in putting the goods in transit, no matter for what cause or for how long, is immaterial. If a loss occurs, not occasioned by the act of God or

DEED OF TRUST.—Continued.

3. *Power of Appointment—Construction.*—A deed of trust of lands securing a promissory note, provided that "in case of the death, inability, or refusal to act" of the trustee, the legal holder of the note should "have the option of substituting any other person in his stead, by writing acknowledged." Held, that the word "inability" is not to be construed as referring to physical or mental capacity merely. Inability to act, within the meaning of the power, might result from the removal from the state and permanent non-residence of the trustee.—*Webster v. Kautz*, 111.

4. *Trustee's Deed—Recitations in*, are *prima facie* evidence of the facts recited.—*Empire Co. v. Howell*, 389.

When a deed of trust of lands provides for the appointment of a substitute to the trustee, and that the recitals of the trustee's deed, upon sale made pursuant to the powers contained in the trust deed, shall be *prima facie* evidence of the truth of the matters recited, evidence *altunde* is not required to support a deed by a substitute trustee, even as against one who claims title from a different source.—*Empire Co. v. Gibson*, 617.

5. *Who May Question the Execution of the Power of Sale.*—One claiming only a tax title to lands is not in position to question the authority of one assuming, as successor in trust, to execute the power of sale in a trust deed thereof from the original owner.—*Vanderpan v. Pelton*, 357.

One showing no title to the lands described in a trustee's deed is not concerned with defects appearing therein, or in the antecedent proceedings.—*Empire Co. v. Howell*, 389.

6. *Limitation.*—The statute of limitation does not bar the execution of a power of sale.—*Vanderpan v. Pelton*, 357.

EJECTMENT.

Judgment—Cancellation of Tax Deed.—The judgment in an action of ejectment may extend to the cancellation of a void tax deed. *Rustin v. M. & M. T. Co.*, 23 Colo., 351, followed.—*Empire Co. v. Stratton*, 577.

But the decree must be limited in its effect to the particular lands demanded in the action. It is not to be extended to other lands described in the deed.—*Id.*, 577.

EMINENT DOMAIN.

Value of Lands Taken—How Estimated.—The value of lands taken under the statute of eminent domain is to be estimated not merely with reference to the use to which it is at the time applied, but with reference to uses to which it is plainly adapted. The owner of lands having thereon an excavation for an irrigat-

EMINENT DOMAIN—Continued.

ing ditch, never used for the purpose, and long since abandoned by the person who made it, is entitled to the market value of the land, taking into account this excavation considered with the reference to the purpose for which it is suited.—*Roberts v. Scurvin Ditch Co.*, 120.

EQUITY.

Following Trust Funds.—Where a bank receives from a depositor, for collection, a promissory note, with directions not to place the amount to the credit of the depositor, the amount when collected is a trust fund, and in case of the insolvency of the bank, presently ensuing, the receiver of the bank will be required to pay over the amount collected, to the depositor.—*Hall v. Beymer*, 271.

That the collection is made by another bank, in a different city, and the draft for the amount is transmitted by the first bank, for its own credit, to a third bank, does not affect the question. The fund may be followed and subjected to the trust so long as it can be traced and identified.—*Id.*

Waiver of Right by the Beneficiary.—The party entitled to the money, in such case, does not waive his right by failing to demand it as soon as informed of the collection. A waiver is accomplished only by some clear unequivocal and decisive act manifesting the purpose, or conduct amounting to an estoppel.—*Id.*

Appellees entered into a written contract with one Smith, cashier of a bank, for the purchase of certain lands. Part of the purchase money was represented by a promissory note of \$6,900, payable in monthly installments of not less than \$100; appellees were to receive the title unencumbered. Smith acted for the bank, which was the equitable owner of the lands, and Smith's deed to appellees was deposited in the bank, as an escrow. Appellees made monthly payments, according to the terms of their promissory note, until no more than \$700 remained due thereon, for both principal and interest. The bank then closed its doors and a receiver was appointed. At the time of appellees' purchase the property was subject to an encumbrance of \$2,500, but of this appellees had no notice. After the purchase price, less by the amount of the encumbrance, had been discharged, Smith issued cashier's checks for the amounts paid, which were attached to the agreement of purchase and the deed to appellees so deposited in escrow. These payments amounted to \$2,000. Held that no trust relation existed as to this amount and that the court wherein the receiver was appointed was without authority

EQUITY—Continued.

to order that, upon payment of the residue of \$700, the receiver should discharge the encumbrance and deliver the deed to appellees.—*Hall v. Ramsey*, 285.

EVIDENCE.

1. *Judicial Notice.*—The courts take judicial notice of the county in which particular lands are situate; and of the county seat of such county.—*Muntzing v. Newsom*, 446.

That force and volume are essential to the effective delivery of water for irrigation.—*Animas Co. v. Smallwood*, 484.

Not the provisions of a municipal ordinance.—*Coors v. Brock*, 470.

2. *Admissability.*—Where it is sought to charge a broker upon his contract to indemnify a customer against loss in the purchase of mining stocks, upon his recommendation, he is entitled to show the market value of the stock, within a reasonable time after the purchase.—*Bullock v. Lewis*, 449.

3. *Opinions.*—In a controversy as to a mining location it is error to receive the opinions of witnesses as to whether the ground was, at the time of the location, vacant and part of the public domain. The question is one for the jury upon evidence as to the actual developments there made.—*King Solomon Co. v. Mary Verna Co.*, 528.

The opinion of an experienced miner that in a particular discovery shaft there was such a showing of vein and mineral in place that a reasonably prudent miner would expend his time in development is competent to establish the validity of the location.—*Id.*, 528.

The opinion of engineers that the veins shown in different workings separated by hundreds of feet of unbroken ground are identical is mere conjecture, not to be accepted as evidence.—*Collins v. Bailey*, 148.

4. *Admission in Pleading.*—An admission in pleading that a tax deed was issued is no admission that it was recorded, or that the same is valid.—*Empire Co. v. Mason*, 612.

5. *Agreed Case—Court Not Restricted to.*—In considering the petition of a depositor in an insolvent bank against the receiver thereof, to be allowed his deposit as a set-off against his promissory note, which, reserving the right of set-off, he has paid to another bank holding it as pledgee of the payee bank, the court is not limited to the facts set forth in an agreement of counsel upon which the petition is heard. The petition being presented and heard in the cause in which the receiver was ap-

EVIDENCE—Continued.

pointed, the court may take into consideration other material facts appearing by the record.—*Hall v. Burrell*, 278.

6. *Uncontradicted Testimony of a Party*.—It is not the law that the unsupported testimony of a party to the action is sufficient as a matter of law to establish any fact, even though such testimony be uncontradicted. The jury are not under an absolute duty to accept such testimony as true.—*Ward v. Atkinson*, 134.

7. *Objections to Evidence*.—An objection to a question propounded, or evidence offered, should assign a clear and positive statement of the ground of objection.—*King Solomon Co. v. Mary Verna Co.*, 528.

An objection which fails to assign any ground of objection presents nothing for the consideration of the court of review.

So an objection to a question assigning as ground thereof that it is "incompetent, and calls for a conclusion."—*Id.*

Burden of Proof.

See **NEGLIGENCE**.

TAX TITLES.**Variance.**

See **NAMES**.

TRIALS.**EXECUTIONS.**

1. *Presumptions as to Regularity of Sale*.—The execution defendant seeking to vacate an execution sale of his lands has the burden of proving such irregularities in its conduct as will overturn the presumption of regularity, which, under the statute (Rev. Stat., sec. 3648), attends the sheriff's deed.—*Victor Co. v. Roerig*, 257.

2. *Duty of Officer Levying—Notice to Debtor*.—The tendency of the decisions is that the failure of the officer to notify the defendant before levying on real estate on which the debtor resides will not authorize a court of equity to vacate the sale, after the period of redemption has expired.—*Victor Co. v. Roerig*, 257.

3. *Bid by Telephone*.—A bid for a fixed sum was communicated to the officer by telephone, and there being no other bids the land was struck off for the amount named, to the person so bidding. *Held*, there was no impropriety in the reception of a bid communicated in this manner, provided the officer made public outcry of the bid, at the place of sale, before striking off the land.—*Victor Co. v. Roerig*, 257.

4. *Sale—Vacating—Inadequacy of Price*.—Land of the value of \$2,000, and encumbered for \$1,200, is sold on execution for

EXECUTIONS—Continued.

\$100. Held that the sale was not to be vacated for inadequacy of price.—*Victor Co. v. Roerig*, 257.

— *Chilling the Sale*.—Mere inadequacy in the price bid by the creditor at an execution sale is no ground to vacate the sale. Otherwise where fraud, or irregularity in the conduct of the sale prevents the obtaining of a fair price.—*LaFitte v. Salisbury*, 641.

— *Diligence Required of Defendant*.—Mere want of knowledge on the part of the execution defendant of a levy upon his residence, or the sale which follows, will not entitle him, after the period of redemption has expired, to vacate the sale, when the sale is in all respects regular and such want of knowledge is not attributable to the purchaser at the sale, but to his own inattention. The courts are without power to arbitrarily extend the period of redemption in order to relieve the hardship of individual cases.—*Victor Co. v. Roerig*, 257.

EXECUTORS AND ADMINISTRATORS.

1. *Right to Control Litigation*.—The personal representative of a decedent, who in that capacity has instituted a litigation, is not to be interfered with therein, by the heirs of the decedent, unless some sufficient cause for such interference is shown.—*McArthur v. Brigham*, 505.

2. *Discharge—Effect*.—After his discharge the executor has no authority to act for the estate of the testator in any manner.—*Lowrey v. Harlow*, 73.

3. *Removal of Administrator—Discretion of County Court*.—The power to remove an administrator reposed by the statute (Rev. Stat., sec. 7120), in the county court, is largely discretionary. The action of that court should not be interfered with by any other court, unless an abuse of discretion is shown.—*Shore v. Wall*, 146.

FEES.

Liability of Officers to County for Fees. See *PUBLIC OFFICERS*.

FRATERNAL SOCIETIES.

Benefit Certificate a Policy of Life Insurance.—It is settled law in this state that the benefit certificate of a fraternal order, is, so far as regards the insurance features thereof, a policy of life insurance, and subject to the same statutory regulations and limitations as those of old line and mutual assessment companies, unless expressly excepted therefrom by statute, and that the act of April 11, 1903 (Laws 1903, c. 119) applies thereto.—*Modern Brotherhood v. Lock*, 409.

See *LIFE INSURANCE*.

FRAUD.

Who May Complain of.—One who has ratified the sale of his land by a broker who acted without authority and sustained towards him no fiduciary relation cannot complain of misrepresentations made by the broker to the purchaser, nor his misrepresentations to others who, without authority, assumed to represent and act for the land owner in consummating the sale.—

Fishback v. Vining, 419.

FRAUDULENT CONVEYANCES.

Evidence.—A creditor, knowing his debtor to be insolvent, accepts goods in satisfaction of his debt, paying the debtor in money the difference between the amount of the debt and the value of the goods. Such payment is only evidence of a fraudulent intent on his part, and not necessarily conclusive.—*Frantz Stores Co. v. Wright*, 170.

HOMESTEADS.

Of the Title Necessary to Householder.—The statute extending to the debtor the right to exempt his homestead from execution (Rev. Stat., sec. 2950) is to be liberally construed. Any interest in lands coupled with possession, by a qualified person, is sufficient to support the homestead right.—*Brooks v. Black*, 49.

Lands held under a mere executory contract of purchase may be claimed as a homestead. Such agreement when recorded is "record title" within the meaning of the statute.—*Brooks v. Black*, 49.

Husband conveys land to his wife with intent to defraud his creditors. The wife conveys to a third person, who takes for value and without notice of the fraudulent character of the husband's conveyance. He executes to the wife a bond condition to reconvey. The wife occupying the premises with her husband may lawfully claim them as a homestead.—*Brooks v. Black*, 49.

HUSBAND AND WIFE.

Right of One Spouse in the Estate of the Other.—Neither spouse has any right, vested or inchoate, in the estate of the other. The husband's consent to the wife's testamentary disposition of her property is effective as against his creditors, and this even though such consent was given with the active purpose to defeat the right which, the husband surviving the wife, the creditors might otherwise have to resort to the husband's moiety of the wife's estate. The creditor has no right to compel the husband to take as against the provisions of the will, and no standing to afterwards question the probate of the will, or the disposition of the wife's property made thereby.—*Deutsch v. Rohlfing*, 543.

INJUNCTION.

Anticipated Injuries.—An injunction may be awarded to prevent the creation of a nuisance, as well as to suppress one already in being; but in such case the bill must set forth both the character of the nuisance and the character of the injury which it is claimed will result therefrom. And the case must be a clear one; though absolute certainty that the anticipated injury will result is not required.—*Seigle v. Bromley*, 189.

The threatened obstruction of a public street, without lawful authority, and causing serious special injury and diminution in value to a property occupied for the purposes of business, entitles the owner of such property to an injunction, even although the property so damaged is at some distance from the place of the obstruction. Such an obstruction interfering with passage and diverting traffic is a nuisance and the injury is irreparable at law.—*Ward v. Colorado & Eastern Co.*, 332.

Practice.—Where it is sought to enjoin the establishment and carrying on, in proximity to plaintiff's dwelling, of a business lawful in itself, but which it is alleged will, if carried on in the manner proposed be offensive and injurious to the health of plaintiff's family, it is necessary and proper for the court to hear testimony as to the effect of what is so proposed.—*Seigle v. Bromley*, 189.

INSTRUCTIONS.

Detailing Facts, must include all the facts material to the rights of all parties.

In an action by a boy for an injury attributed to defendant's negligence in driving an auto car upon the public streets, defendant testified that he didn't see the boy until he rode out from behind a wagon, directly in front of his machine; and the evidence left the question of defendant's conduct and whether he omitted anything which he could have done to avoid the injury, in sharp dispute. Held an instruction which left it to the jury to find the defendant guilty of negligence if he could have stopped or checked his speed when he first saw the plaintiff, whether plaintiff was then in any peril or not, was error; that until the peril of the boy was apparent defendant had the right to assume that the boy would turn to his right or the west side of the street, as defendant was turning to the east, or if, by reason of the plaintiff's immaturity, defendant had no right to indulge this presumption, it was for the jury to say whether, under all the circumstances, defendant should be held to a knowledge of the immature years of the plaintiff, and when,

INSTRUCTIONS—Continued.

if at all, it became defendant's duty to make reasonable effort to check or stop his machine.—*Kent v. Treworsy*, 441.

— *Misleading*.—Where there is no instruction as to the elements of damage, and the court during the progress of the trial has made frequent and diverse rulings as to the admissibility of testimony, a direction to the jury not to consider "any remark, decision or order made during the trial" serves to accentuate the improper freedom allowed the jury to enter into the field of conjecture, and is error.—*Colorado Springs Co. v. Albrecht*, 201.

False as to Either Law or Fact.—An instruction which announces as the law what is not the law, or which assumes as proven what is not supported by the evidence, or withdraws from the jury an issue of fact exclusively within their province, involves fatal error.—*King Solomon Co. v. Mary Verna Co.*, 528.

Construction.—The charge of the court is to be taken as a whole. An instruction, which by itself, might be erroneous, may be qualified by what appears in another part of the charge.—*Coors v. Brock*, 470.

Objections and Exceptions to.—An exception to the whole of an instruction, no attempt being made to call the attention of the court to the only clause or phrase complained of—the instruction being of considerable length—is inapt, and will not entitle the defeated party to a review of the instruction.—*Ward v. Atkinson*, 134; *Atcheson Co. v. Gumaer*, 495.

Non-Direction.—Where throughout the trial the defendant insists, in vain, upon the true rule of damages, he will not be regarded as waiving his right to a suitable instruction upon the question, by merely failing to expressly request it.—*Colorado Springs Co. v. Albrecht*, 201.

Not Referring the Jury to the Evidence.—It is not required that every instruction should by express words require the jury to find "from the evidence."—*Sholine v. Harris*, 63.

Invading the Province of the Jury.—An instruction which assumes to declare a matter of law, what is in fact a question for the jury, is fatal error.—*Great Western etc. Co. v. Parker*, 18.

See TRIALS.

Conflicting.—Where instructions conflict it is impossible to know by which the jury were controlled; therefore, instructions which are in direct conflict, one of which is false in law, constitute fatal error, even though the other is without fault.—*Great Western etc. Co. v. Parker*, 18.

IRRIGATION.

Duty of Irrigating Company.—A corporation operating a canal or ditch for conveying water for irrigation to the proprietors of the lands thereunder is bound to carry and deliver water to the class of consumers named in its certificate of incorporation, and the service must be performed for a reasonable maximum charge, to be fixed by the board of county commissioners, upon proper application made.—*Northern Colorado Co. v. Pouppirt*, 563.

Right of Consumer.—The carrier may not exact of the consumer a *bonus*, as a condition of performing its duty. The land owner who has purchased water from such corporation for one or more years is entitled to continue such purchase in subsequent years, and the carrier is under a corresponding duty to carry and deliver the water.—*Northern Colorado Co. v. Pouppirt*, 563.

How Affected by Abandonment of a Prior Contract.—Plaintiff's grantor of certain lands had purchased of defendant "the right to receive and use water" from defendant's canal, for the irrigation of such lands. Nothing in the contract specifically required the grantor to continue for any definite time in the exercise of his right, nor was there in the conveyance under which plaintiff held the lands, any condition or requirement that he should observe or perform any of the conditions of the contract under which water had been obtained. Held that a provision of his contract that upon failure of the grantor to pay the annual rental, he should surrender all right or interest thereby created, did not necessarily involve a surrender of the statutory right to continue to purchase water for the same land, and that notwithstanding plaintiff's repudiation of the contract, his right under the statute was undeniable.—*Id.*, 563.

Order of County Commissioners Prescribing Rate of Charge—Effect.—The order of the county commissioners, made upon proper application, prescribing the rate to be charged by an irrigating company, for the carriage and delivery of water, is binding upon the corporation until relief has been afforded in some appropriate proceeding.—*Northern Colorado Co. v. Pouppirt*, 563.

Certainty Required in the Order.—The order of the county commissioners fixed the maximum rate to be charged by an irrigation company "for any irrigation season," "at \$1.00 per acre." The volume of water which the company was required to furnish was not prescribed. The consumer had for many years taken water from the same ditch, under a contract which prescribed the quantity as, "sufficient for the production of good average

IRRIGATION—Continued.

crops, under skillful irrigation, not to exceed" a certain prescribed volume. The order of the county commissioners was construed as based upon the long usage prevailing between the parties, and as therefore sufficient, notwithstanding its failure to specify the volume to be delivered.—*Id.*, 563.

JUDGMENTS.

1. *Presumption of Jurisdiction.*—Whoever would question the judgment of a court of general jurisdiction for want of jurisdiction of the person must definitely negative every fact and process by which jurisdiction might have been obtained. A mere averment, in questioning a judgment reviving a former judgment, that "no order to show cause why said judgment should not be revived was ever issued," not denying the service of process in other form, or voluntary appearance, is wholly insufficient.—*Salisbury v. La Fitte*, 90.

2. *Jurisdiction of the Person—Recitals of the Record.*—Recitals of a decree by default that "plaintiff's attorney filed his affidavit showing defendant's non-residence, and that after diligent search and inquiry he cannot ascertain his whereabouts or postoffice address," will not be accepted as conclusive of the matters so recited, where the affidavit upon the files fails to disclose such matters. It will not be inferred that any other affidavit was presented.—*Empire Co. v. Mason*, 612.

3. *Presumption of Regularity.*—Nothing appearing to the contrary, it must be presumed that the district court in permitting the filing of a substituted return to a writ previously executed, and lost from the files, acted in the due exercise of its lawful powers.—*Salisbury v. La Fitte*, 90.

4. *Validity as Depending on Averments of Complaint.*—A judgment of the county court upon a complaint which omits the statutory allegation as to the value in controversy is open to collateral attack.—*Bloomer v. Jones*, 404.

5. *When a Bar.*—A judgment of non-suit, for the failure to establish by testimony a case sufficient to go to the jury is no bar to a subsequent action upon the same cause of action.—*Norton's Estate v. McAlister*, 293.

6. *Upon Whom Binding.*—A decree against the trustee in a deed of trust securing a promissory note does not affect the holder of the note. The trustee is not the representative of the creditor in a litigation extraneous to the subject of the trust.—*Webster v. Kautz*, 111.

A decree quieting title to lands is without effect as to one who, not having notice of the pendency of the suit, purchases
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JUDGMENTS—Continued.

from a defendant to the cause, by conveyance recorded before the filing of any notice of the pendency of such action.—*Dalander v. Howell*, 386.

A judgment affects only parties, and only in the capacity in which they are tried. Judgment against one as an individual has no effect upon him in his capacity as trustee in a deed of lands, in the nature of a mortgage.—*Webster v. Kautz*, 111.

7. *Several*.—Where the liability of the defendants in several, several judgments may be entered at different times.—*Toll v. Cobbey*, 244.

8. *Certainty*.—At suit of those holding under the land owner an irrigating company was enjoined from interfering with or preventing plaintiffs from opening or closing any or all of certain boxes, which had theretofore been set for the use of plaintiff, at the same time, or otherwise; and the plaintiffs were enjoined from diverting to the land, at any one time, more than four cubic feet of water per second. Held that the latter clause of the decree was not sufficiently specific; that it should have confined the plaintiff to the use of boxes, at one time, the total capacity of which should not exceed four cubic feet of water per second of time.—*Animas Co. v. Smallwood*, 476.

9. *Collateral Attack*.—Bill to quiet title, the plaintiff claiming under a sale upon execution issued upon a judgment against the defendant in the equitable action. Jurisdiction of the subject matter, and of the person of the defendant, in the court rendering such judgment, being admitted, the judgment can not be questioned.—*LaFitte v. Salisbury*, 641.

10. — *How Far Conclusive*.—A bill to vacate a judgment and an execution sale of lands thereunder, for fraud in procuring the judgment is dismissed for want of equity. The decree is conclusive upon the plaintiff therein, as to all matters alleged in the bill, when the defendant brings an action to quiet the title derived under the execution sale. But other grounds of objection to the sale, though existing at the filing of such bill may be presented.—*LaFitte v. Salisbury*, 641.

LIFE INSURANCE.

1. *Construction of Policy*.—With us it is the adopted rule that in construing a policy of life insurance, no distinction is made between those of old line companies and those of fraternal societies.—*Mutual Life Co. v. Lowther*, 622.

2. *Change of Beneficiary*.—A policy of life insurance reserved to the insured the right to revoke the appointment of the beneficiary therein named, and designate another, "by filing a

LIFE INSURANCE—Continued.

written notice thereof at the home office of the company, with the policy," and that such change of beneficiary should "take effect upon the endorsement of the same upon the policy." The insured, two days before his death, directed a change in the beneficiary, and mailed the policy with notice of the change to the home office of the company. The death occurred before the receipt of these papers by the company. Held that inasmuch as the company's approval or consent was not required to give effect to the change, and the assured had done everything required of him, the failure of the notice to reach the company until after the death of the insured, was immaterial.—*Mutual Life Co. v. Lowther*, 622.

3. *Suicide as a Defense*.—It seems that under sec. 1, and clause 1 of sec. 73, of chapter 193 of the Laws of 1907 (Rev. Stat., secs. 3087, 3160) suicide of the insured would be a defense to an action upon a certificate issued by a fraternal order, since that enactment.—*Modern Brotherhood v. Lock*, 409.

But policies issued while the prior enactment was in force (Laws 1903, c. 119), are controlled by that enactment.—*Id.*

That statute not only made void any provision of the policy exonerating the insurer, in case of suicide of the insured, but in legal contemplation the statutory prohibition was substituted therefor, and became an affirmative covenant of the insured that the defense should never be made. The act of 1907 is not to be accepted as a legislative construction of the act of 1903, opposed to that of the supreme court, but rather as a recognition of that interpretation as of universal application to contracts of insurance, and as a positive enactment limiting the prohibited features of the policy to insurance companies, other than those named in sec. 73 of the Insurance Code.—*Id.*, 409.

And the repeal of the act of 1903 by the act of 1907 did not affect benefit certificates issued prior to such repeal, nor as to these revive a defense which the statute had taken away.

Waiver of Statute.—The parties to the contract of life insurance cannot by any prior or contemporaneous agreement waive the statutory inhibition against the defense of suicide.—*Id.*, 409.

LIMITATIONS.

1. *New Promise—Payment*.—One who, by inheritance or purchase, takes title to lands with notice of a mortgage existing thereon, and by payments upon the mortgage indebtedness and other acts, within the period of limitation, admits the existence of the mortgage lien, will not be permitted to plead the statute

LIMITATIONS—Continued.

of limitations to a bill to foreclose the mortgage, even though at the institution of the foreclosure bill the mortgage indebtedness is barred by the statutes and no personal judgment could be recovered against the one making such payments.—*Lowrey v. Harlow*, 73.

2. *Payments by Parent—Effect as to Minor Child.*—As a general rule, a minor can do no act and make no admission which binds him, nor can the parent acting for him.

The mother taking by the will of her husband a three-fourths interest, undivided, in lands, makes payments of interest upon a mortgage thereof. Such payments have no effect to stay the course of the statute as to a minor child who takes the other undivided fourth of the lands by inheritance.—*Lowrey v. Harlow*, 73.

3. *When the Statute Begins to Run.*—Where by agreement personal services are to be compensated only at the death of the party receiving them, the action accrues upon his death, and the statute runs from the same date.—*Norton's Estate v. McAlister*, 293.

4. *Color of Title—Payment of Taxes.*—To avail of the payment of taxes under color of title as a defense to a bill to quiet title to lands, the defendant must show payment of all taxes legally assessed against the lands for seven successive years.—*Bloomer v. Cristler*, 240.

After Action Commenced, by the paramount owner avails nothing.—*Empire Co. v. Howell*, 389; *Lougee v. Beeney*, 603; *Empire Co. v. Gibson*, 617.

The seven year limitation (Rev. Stat., sec. 4090) is not available to one claiming under a tax deed not of record for the full term of seven years, at a time when an action for the recovery of the lands is instituted.—*Empire Co. v. Howell*, 584.

One asserting title to unoccupied lands, under the statute (Rev. Stat., 1908, sec. 4090) must show (1) Color of title obtained in good faith, (2) Payment of taxes by the holder of such color of title for the full period of seven years; and such color of title and payment of taxes must exist, concurrently without interruption, through the full statutory period. Taxes which are already due and payable when color of title is acquired, and which are afterwards paid, are not to be counted as one of the payments required by the statute.—*Id.*, 584.

A treasurer's deed of lands sold for taxes is not color of title until recorded.—*Empire Co. v. Mason*, 612; *Empire Co. v. Gibson*, 617.

LIMITATIONS—Continued.

5. *Five Year Statute.*—The short statute of limitation (Mills' Stat., sec. 3904; Rev. Stat., sec. 5733) is not available to defendant in an action to quiet title.—*Empire Co. v. Mason*, 612.

6. *Adverse Possession*, cannot be established by inference or implication. An admission that defendant was in possession of the land for some time prior to the institution of the action is not sufficient.—*Fleming v. Howell*, 382.

Constructive.—Title in fee draws to it constructive possession of the land.—*Webster v. Kautz*, 111.

A void deed does not confer constructive possession of land. The paramount owner is in law, deemed to continue in possession until actual entry and possession taken by another, or until payment of taxes for the requisite period, concurrent with color of title made in good faith, as provided by the statute (Rev. Stat., sec. 4090) shall, in the case of vacant lands, have become equivalent in law to an actual ouster.—*Fleming v. Howell*, 382.

7. *Trust Deed.*—The statute of limitations does not bar the execution of the power of sale contained in a deed of trust, even though an action for the debt secured thereby is barred.—*Vanderpan v. Pelton*, 357.

8. *Pleading.*—The statute must be expressly pleaded.—*Fleming v. Howell*, 382.

Defendant who with full knowledge of all the facts, goes to trial without pleading the statute of limitations, waives the defense. He may not present the defense by a supplemental answer tendered months after the trial.—*Empire Co. v. Chapin*, 538.

LIS PENDENS. See NOTICE.

MASTER AND SERVANT.

1. *Master's Duty as to the Place of Work.*—The master is bound only to ordinary care to make the place where the servant works reasonably safe.—*Great Western etc. Co. v. Parker*, 18.

But he is under this duty even where the place of the servant's employment is upon the premises of another.—*Id.*

The master may be presumed to be informed of a condition of his premises involving danger to the servant there employed, where such condition has existed for a time sufficient to enable the master, or his servant charged with his duty in that behalf, to have learned of the danger and corrected the defect, by the exercise of reasonable care.—*Id.*

But the master is not under an absolute duty in this respect.

In an action against a railway company for the death of a servant, attributed to alleged defects in the place of employment, an instruction that it was the duty of the defendant "to provide

MASTER AND SERVANT—Continued.

for its employes a reasonably safe place to work," was held error.—*Id.*

2. *Master's Duty to Warn and Instruct Servant of Danger.*—

If the service is attended by unusual risks, not obvious, and presumptively not within the knowledge of the servant, the master having knowledge thereof, is under duty to warn servant. If by reasonable care the master would have known of such danger, he is chargeable with knowledge thereof.

A man of limited education was employed as janitor in the establishment of a company publishing a newspaper. It was part of his duty to clear up, daily, metal scraps accumulated about a cutting machine which was operated by electricity. He had no acquaintance with machinery operated by electric power. No warning was given him of any danger to be apprehended from the current. Defendant's employees who operated the machine were entirely familiar with these dangers, and it was their custom whenever required to go under the machine, to turn off the current. On the occasion in question the machine was not in motion and nothing suggested any danger; but the current had not been turned off, and plaintiff in passing about it in the discharge of his daily duties, came in contact with the electrified surface and received a serious injury. It was held that the humble calling of the plaintiff should have suggested to the master the servant's ignorance of electricity and its dangers, and that under the circumstances of the case there was an absolute duty upon the master to instruct the servant, at the time of his employment, of the dangers to which he might be exposed, and to avoid contact with any part of the machine.—*Colorado Springs Co. v. Simmons*, 303.

Instructions, as to the duty of the master towards the servant and his liabilities, commended.—*Colorado Springs Co. v. Simmons*, 303.

3. *Servant's Assumption of Risk.*—The servant assumes the risk of injury from defects and dangers in the place of his employment, not only when they are ordinarily incident to the work, but extraordinary defects and dangers, of which he is, by any means informed, or which are so patent and obvious as to be readily observed, and the danger of which he understands and appreciates.—*Great Western etc. Co. v. Parker*, 18.

The servant is not under duty to inspect the machine about which he works or the place in which he works, to discover defects which are not obvious.—*Colorado Springs Co. v. Simmons*, 303.

MASTER AND SERVANT—Continued.

4. *Duty of Master to Servants of Another Master.*—A manufacturing company which maintains in its premises railway tracks where by its request and invitation a railway company switches cars, bringing freight to, and removing freight from, such premises, is under duty to the servants of the railway company to exercise reasonable care to make such premises reasonably safe for their use.—*Great Western etc. Co. v. Parker*, 18.

MAXIMS.

Wrong-doer Shall Not Have Advantage of His Own Wrong.—A promissory note is in the hands of the sheriff, to be sold on execution against the payee. The plaintiff in the execution prevents the sale and induces the sheriff to deliver the note to him. In an action by the payee for the conversion of the note, he will not be heard to say that it is in the custody of the law.—*Salisbury v. La Fitte*, 90.

MECHANICS' LIENS.

1. *Complaint.*—A mere allegation that as to one of the defendants plaintiff has been informed that the party "claimed some interest of record in the above described property," no attempt being made to state the nature of his interest, or that it is subject to the lien, is not sufficient.—*Clark Co. v. Centennial Co.*, 174.

Where it is sought to enforce a lien upon a mining claim for materials contracted for by a lessee, it is sufficient as against a general demurrer to allege that such materials were used in the development, etc., of the property with the knowledge of the owner. It is not required to show that by the terms of the lease, development or improvement was required.—*Id.*

And the complaint need not aver that the owner failed to give notice that he would not be responsible, under the statute.

The complaint need not describe the structures in which such material was used.—*Id.*

2. *Improvements Made by Lessee.*—The act of 1899 (Laws 1899, c. 118, Rev. Stat., sec. 4029), gives a lien in favor of those performing labor or furnishing materials by contract with the lessee, unless the lessor gives the notice required by the act.

In default of such notice, the lessor is deemed to adopt the act of the lessee as his own.—*Clark Co. v. Centennial Co.*, 174.

That such notice was given by the lessor is an affirmative defense which he must plead.—*Id.*

3. *Statement of Lien—Time of Filing.*—A statement of the lien filed within two months of the time when the last material

MECHANICS' LIENS—Continued.

was furnished is in due season.—*Clark Co. v. Centennial Co.*, 174.

4. *Personal Judgment.*—Even where no lien is allowed, the plaintiff is entitled to a personal judgment for the value of materials furnished at request of the defendant.—*Clark Co. v. Centennial Co.*, 174.

MERCHANTS:

Duty to Customers as to Safety of Place.—A merchant owes to those who come to trade at his place of business reasonable care that the place shall be safe. He is not an insurer of the safety of his patrons.—*Thompson Co. v. Phillips*, 428.

MINES AND MINING.

1. *Location—Discovery of Mineral—Evidence.*—The question being as to the validity of the location of a lode claim, the opinion of an experienced miner that there was such a showing of vein and mineral in place that a reasonably prudent miner would expend his time in the development of the claim, is competent.—*King Solomon Co. v. Mary Verna Co.*, 528.

2. *Abandonment.*—An amended location, the filing of a new location certificate, and the sinking of a new shaft, is not of itself an abandonment of the original location.—*King Solomon Co. v. Mary Verna Co.*, 528.

3. *Following Dip of Vein.*—The right to follow the dip of the lode granted by sec. 2322 of the Revised Statutes of the United States is in derogation of the common law, and whoever claims under the statute has the burden of proving the continuity of his vein from his surface ground into the premises of his neighbor. And the question is not to be left to the conjectures of the party, or even of expert witnesses, not supported by any competent testimony affording ground for an intelligent judgment.

Where the place of the alleged trespass upon plaintiff's vein was separated from the apex of defendant's vein by five hundred and fifty feet of unbroken ground, was distant from it longitudinally, at right angles, three hundred feet, there were many veins upon the same mountain of the same general dip and strike as the plaintiff's vein, and with the same character of ore, the only working and opening upon defendant's vein at the surface was a shaft of less than one hundred feet in depth, the only opening upon the vein at the point of the alleged trespass was an upraise of forty-five feet, and there was evidence that if the vein in such upraise continued in the same course to the surface it would have

MINES AND MINING—Continued.

its apex within the plaintiff's surface ground, it was held that the opinion of engineers that the vein shown in the two openings was the same, was mere conjecture and too wild a guess to be accepted as proof.—*Collins v. Bailey*, 148.

MORTGAGES.

Estate of Mortgagee.—The legal title of the mortgagee is recognized only for the benefit of the holder of the mortgage debt. As against all other persons the mortgagor has the legal estate.

One who conveys by deed of trust is a mortgagor within the rule.—*Empire Co. v. Howell*, 584.

A mortgage of lands does not vest title in the mortgagee, but confers a mere lien. An absolute deed intended merely as security has no greater effect than a mortgage with a defeasance expressed.—*Fehringer v. Martin*, 634.

MUNICIPAL CORPORATIONS.

Ordinance—Publication.—An ordinance of a town which assumes to authorize the issue of bonds of the municipality for the purchase of a system of water works, is void unless published as required by the statute. *Aurora v. Hayden*, 23 Col. Ap., followed. —*Town of Fletcher v. Childs*, 641.

NAMES.

Idem Sonans.—Names of identical sound in pronunciation, though of different orthography, are regarded as identical. This doctrine applies to records, judgments and the like.

Brooks is not idem sonans with Brooke.—*Bloomer v. Oristler*, 240.

NEGLIGENCE.

1. *Definition.*—Negligence is the failure to exercise such care, prudence and foresight as duty requires under the circumstances.—*Thompson Co. v. Phillips*, 428.

2. *Evidence.*—To establish negligence the facts from which negligence may be inferred must be proved.—*Thompson Co. v. Phillips*, 428.

Plaintiff had for years been a customer at defendant's market. At an early hour in the morning she came into the defendant's store, and approaching the clerk with whom she wished to deal, she suddenly slipped and fell, receiving a serious and permanent injury. While resting after the fall she discovered upon her shoe, between the ball of the foot and the instep, a piece of fatty substance like tallow. No other person saw this

NEGLIGENCE—Continued.

substance. The lady threw it from her and omitted to call the attention of any other person to it. She experienced no sense of slipping upon any such substance before the injury. The store was well lighted. Plaintiff's eyesight was good, she was looking where she walked and saw nothing of this fatty substance. It was the custom at defendant's place of business to scrub the floors once every week, and sweep them four or five times every day, and always in the morning between the time of opening and 7:30 of the clock. The floor had been swept on the morning of the accident. Employees of defendant examined the place immediately after the accident and could find no grease or evidence that there had been grease at that place. Nothing of the sort was kept near it. There was no direct evidence that if any such substance was in fact upon the floor, defendant was negligent in permitting it to be there, or in not finding and removing it. *Held*, that inasmuch as if, upon the question of defendant's negligence in this respect the jury were permitted to indulge in speculation and conjecture, it was as reasonable to conclude that the fatty substance found upon plaintiff's foot had gotten there in the street, or in some other place, as in defendant's establishment, the plaintiff's case was not proven, and it was error to submit it to the jury.—*Thompson Co. v. Phillips*, 428.

3. *Burden of Proof*.—Whoever charges negligence has the burden of proof. The mere fact that live stock are killed by a train, on the tracks of a railroad, raises no inference of negligence in the operation of the train.—*Atchison Co. v. Gumaer*, 495.

4. *Automobile—Duty of Driver Towards Others on Street*.—One driving an automobile upon the public street is bound only to reasonable care to avoid injury to others. Seeing a boy approaching upon a bicycle, it is not incumbent upon him to do anything until it is apparent that a contact is inevitable, or at least highly probable; and even then his failure to stop or check his speed is not negligence *per se*, but only evidence from which the jury may infer negligence, or refuse to draw that inference, according to all the circumstances.—*Kent v. Trewoorgy*, 441.

In an action for an injury attributed to the negligence of defendant in the management of an auto car upon the public street, an instruction to the effect that if before the accident, the defendant saw plaintiff approaching upon his bicycle, and there was sufficient time and sufficient space between them, "to have permitted of defendant lessening his speed sufficiently to have avoided the accident," it was negligence on the part of defendant not to do so, is error, as importing that if the defendant

NEGLIGENCE—Continued.

failed to exercise the highest degree of care possible he was negligent as a matter of law.

So an instruction that if defendant "had sufficient time after first seeing plaintiff approach upon his bicycle to have stopped the same or brought it to such slow speed as to avoid the accident," but he "maintained the same speed until after the accident," they might find that defendant was negligent and that such negligence caused the plaintiff's injury.—*Id.*, 441.

NEW TRIAL.

1. *Newly Discovered Evidence—Affidavit.*—Motions for a new trial grounded upon newly discovered evidence are not regarded with favor. The denial of such a motion by the trial court will not be disturbed save in case of gross abuse of discretion.—*Ward v. Atkinson*, 134.

Where the application is grounded upon the alleged discovery, since the trial, of the whereabouts of an absent witness, the affidavit must by a statement of the facts show what efforts the party made before the trial to ascertain the whereabouts of such witness. A mere averment of "all possible diligence" will not suffice. And where it is manifest by the record that long prior to the trial the applicant knew of the materiality of the testimony of the witness, and knew of his whereabouts, the application should be denied.—*Id.*

The affidavit of the absent witness as to the facts to which he will testify should be produced, or the failure to procure it excused.—*Id.*

Documentary Evidence Newly Discovered.—Where the application for a new trial is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear.—*Colorado etc. Co. v. Breniman*, 1.

2. *Passion or Prejudice.*—That the jury give credit to the witnesses examined for one party, rejecting the adversary testimony, is not evidence that they act from passion or prejudice.—*Coors v. Brock*, 470.

3. *Diligence.*—In an action by consignor of live stock against a railway company, second in the line of transit, for losses attributed to negligence in caring for the stock, the question being whether, at the time the neglects complained of occurred, the defendant had accepted the animals for carriage, a new trial will not be awarded on account of the recent discovery of the contract of the first company in the line of transit. Ordinary cau-

NEW TRIAL—Continued.

tion required counsel to seek for and procure this evidence prior to the trial.—*Colorado etc. Co. v. Breniman*, 1.

4. *Amendment—New Defense.*—Where, after verdict for the defendant, a new defense is received by way of amendment to the answer, it is the duty of the court to award a new trial.—*Collins v. Bailey*, 148.

NOTICE.

Lis Pendens.—Notice of the pendency of a suit involving title to land, filed after the recording of a conveyance, is no notice to the grantee in such conveyance (Mills' Code, sec. 36, Rev. Code, sec. 38).—*Dalander v. Howell*, 386.

NUISANCE.

Nuisance per se.—Where the court upon hearing testimony finds that the business sought to be enjoined is a nuisance, such as should be enjoined, the question of nuisance *per se* is not presented.—*Seigle v. Bromley*, 189.

Remedies.—The keeping of swine is in itself a lawful business, but to maintain a place where hogs are fed upon offensive garbage, and which is conducted in such manner as not only to be offensive, but to probably occasion disease, is both a public and private nuisance, and may be proceeded against by indictment, or one sustaining a special injury may have an injunction, or an action for damages.—*Seigle v. Bromley*. 189.

See INJUNCTIONS.

PLEADINGS.

1. *Verification.*—The provisions of the code (Rev. Code, sec. 67), requiring that when a pleading is verified by some one other than the party the affidavit must state the reason why the verification is not made by the party himself, is mandatory. A reply verified by the attorney of the plaintiff without any showing why the verification is not made by the plaintiff, should be stricken from the files.—*Colorado Springs Co. v. Albrecht*, 201.

2. *Answer—Evasive Denials.*—The first defense of the answer traversed every allegation of the complaint "except as expressly herein admitted." Nothing indicated what was intended by this exception. Held evasive, if attacked by demurrer or motion; but no exception being taken to it, it was accepted as putting in issue the material allegations of the complaint.—*Salisbury v. La Fitte*, 90.

Inconsistent Defenses.—Bill to quiet title. Answer denying

PLEADINGS—Continued.

both plaintiff's title and possession and containing a cross-complaint alleging that plaintiff asserts title solely under a certain treasurer's deed, setting forth fatal defects therein. The cross-complaint held not inconsistent with the answer.—*Empire Co. v. Chapin*, 538.

3. *Separate Defenses*, must each be regarded as if standing alone, and complete in itself, unless it distinctly and intelligently refers to what is elsewhere stated.

Conclusions of Law.—An averment that the court in which a certain judgment was rendered "was without jurisdiction to render the judgment" is a mere conclusion of law.—*Salisbury v. La Fitte*, 90.

4. *What Must Be Specially Pleaded*.—Action to enforce a mechanic's lien for improvements made by lessee. If the lessor would show that the notice required by the statute (Rev. Stat., sec. 4029) was given he must plead it specially.—*Clark Co. v. Centennial Co.*, 174.

The statute of limitations must be pleaded.—*Fleming v. Howell*, 382.

Action against an irrigating company for refusing to furnish water to one entitled to it. Plaintiff, in order to obtain the water, had tendered a rate in excess of that prescribed by the county commissioners. Held that without pleading this, he was entitled to prove it, in order to relieve himself of the imputation of failing to do what was reasonable, in order to minimize his injury.—*Northern Colorado Co. v. Pouppirt*, 563.

In an action to enforce a lien for improvements made under contract with a lessee, the lessor if he would show that the notice prescribed by the statute was given must plead this defense.—*Clark Co. v. Centennial Co.*, 174.

5. *Reply*.—Plaintiff, claiming an equitable title to certain lands, under a bond for a deed from one having the legal estate, brought suit to quiet her title as against the holders of sheriff's deed, upon sale under execution against a stranger, as a cloud upon her title. The answer alleged that the only interest of plaintiff was derived by conveyance from the execution defendant, her husband, made without consideration, and in fraud of his creditors. Held, plaintiff was entitled to reply that she was a householder and the head of a family occupying and claiming the premises as her homestead, and had made the statutory claim thereto, as a homestead, prior to the recovery of plaintiff's judgment.—*Brooks v. Black*, 49.

The complaint alleged that a certain promissory note had

PLEADINGS—Continued.

been levied upon by the sheriff under garnishee process in favor of defendant and against plaintiff, and by order of the court had been turned over to the sheriff for sale, that defendant prevented the sale and induced the sheriff to turn the note over to him, and converted it. Neither the complaint nor the answer suggested that defendant claimed the note through any execution sale. Averments of the reply that defendant "never recovered any judgment" against plaintiff, and "no execution ever issued against her," held irrelevant and immaterial to the defenses presented by the answer.—*Salisbury v. La Fitte*, 90.

So, averments of the reply that defendant "never became the owner" of a certain judgment, nowhere else mentioned or alluded to, or in any way connected with the supposed right of action.—*Id.*, 90.

6. *Demurrer*.—Ambiguous or indefinite statements are not to be assailed by a general demurrer.—*Clark Co. v. Centennial Co.*, 174.

A demurrer interposed to the complaint as a whole is properly overruled if any count states a cause of action.—*Price v. Kit Carson County*, 315.

Waiver of Demurrer by Amendment.—The amendment of an answer after a demurrer sustained thereto waives any error in the ruling on the demurrer.—*Deutsch v. Rohlfing*, 543.

7. *Certainty—Averments Made on Information*.—The allegation that plaintiff "has been informed" of a certain state of facts is not an allegation of the fact, and its denial raises no issue.—*Clark Co. v. Centennial Co.*, 174.

The complaint sets out a writing. The contents thereof are no part of the averments of the complaint.—*Clark Co. v. Centennial Co.*, 174; *Colorado Springs Co. v. Albrecht*, 201.

8. *Aider by Pleading Over*.—All objections to the complaint, except that it fails to state sufficient facts, are waived by an answer to the merits.—*Great Western etc. Co. v. Parker*, 18.

9. *Amendment—Discretion of the Court*.—The allowance or rejection of an amendment to the pleadings is ordinarily committed to the sound discretion of the trial court. Where the record fails to show the reasons upon which the court acted in striking out an answer or counterclaim, the propriety of its action will not be reviewed upon appeal.—*Deutsch v. Rohlfing*, 543.

Repetition, of a pleading already adjudged to be insufficient may be stricken out on motion.—*Deutsch v. Rohlfing*, 543.

New Defense.—To allow, pending plaintiff's motion for a

PLEADINGS—Continued.

new trial, an amendment of the answer setting up a new defense, upon which no sufficient or competent testimony was given upon the trial, is error.—*Collins v. Bagley*, 148.

— *Showing Cause*.—So, to allow such amendment, without cause shown therefor, as required by the code (Mills' Code, sec. 75, Rev. Code 1908, sec. 81).—*Collins v. Bailey*, 148.

10. *Substitution of Parties*.—A complaint to enforce a mechanic's lien, following the Lien Statement required by the statute, named an individual as one of the defendants, and a certain company, averring that the material was furnished to the individual while doing business under the name of such company, and at his request. It averred a lack of information as to whether the company was a corporation or a partnership. An amended complaint alleged the incorporation of the company, that the material was furnished to it, and joined it in its corporate capacity, praying judgment against it and praying nothing against the individual. Held, that by this substitution no injury was occasioned to the owner of the property, who was also joined as defendant, and that the amendment was warranted by sec. 82, Rev. Code, and sec. 4306, Rev. Stat.—*Clark Co. v. Centennial Co.*, 174.

11. *Parties—Bringing in New Parties*.—No specific order is necessary to entitle the plaintiff to bring in a new party defendant. Under general leave to amend his complaint he may add parties, without any especial order to that end.—*Toll v. Cobbeey*, 244.

12. *Judgment on the Pleadings*.—Even though the defendant moves for judgment on the pleadings, and his motion is denied, he cannot be condemned in damages, without evidence, where he has interposed the general denial.—*Salisbury v. La Fitte*, 90.

Bill to quiet title. The answer denied both plaintiff's title and possession, and averred that "that whatever estate the defendant hath or asserts is based upon the certain treasurer's deed," alleging divers fatal defects therein. The replication denied every allegation of the answer except the allegation that plaintiff held the treasurer's deed described. Held that inasmuch as both plaintiff's title and possession was in issue his motion for judgment upon the pleadings was properly denied.—*Empire Co. v. Chapin*, 538.

13. *Construction*.—The complaint is to be taken in its entirety and receive a liberal construction.—*Great Western Co. v. Parker*, 18.

A complaint against a manufacturing company and a rail-

PLEADINGS—Continued.

way company, for negligence in constructing, maintaining and operating trains upon a switch track, within the premises of the manufacturing company, with poles set in such proximity thereto as to endanger the lives of those operating the trains, and charging the death of a brakeman, occasioned by reason thereof, held to state a joint cause of action against the two corporations.

— *Allegations Not Proven*, and eliminated by instruction from the consideration of the jury will not be regarded in construing the complaint upon appeal.—*Great Western etc. Co. v. Parker*, 18.

On general demurrer the complaint must be liberally construed. General allegations showing a right of action suffice.—*Salisbury v. La Fitte*, 90.

In an action by servant against master the complaint alleged that a certain machine maintained in the master's establishment for trimming type-metal, operated by electricity, was in defective condition; that the insulation thereof, and of the wires attached to it, was so defective as to permit the electrical current to be transmitted to any one coming in contact with any part of the machine; but it was not alleged that this condition was due to negligence on the part of the defendant. In another paragraph it was alleged that it was the duty of the plaintiff, on occasions specified, to remove the pieces of metal which accumulated about the machine; that on the occasion of the injury defendant had negligently left the current turned upon the machine, and thus increased the danger, to any one coming near it; that while the machine was defective and out of order, and the current passing through it, plaintiff, while engaged in his duty aforesaid, came in contact with the machine, and sustained the injury complained of. Held that the complaint grounded the action not upon the defective condition of the machine, but upon negligence in failing to turn off the current.—*Colorado Springs Co. v. Simmons*, 303.

Elkton Co. v. Sullivan, 41 Colo., 241; *Denver Co. v. Walters*, 39 Colo., 301, distinguished.

Action to quiet title to lands in the county court, no money judgment being demanded. Averment in the complaint that "the amount herein involved and sued for does not equal \$2,000," gives no indication of the value of the lands. A judgment given thereon for plaintiff is void.—*Bloomer v. Jones*, 404.

Complaint held sufficient to admit evidence of a former adjudication of the rights asserted by plaintiff.—*Northern Colorado Co. v. Pouppirt*, 563.

PRACTICE.

Non-Suit—Time to Move.—The phrase "before trial" in clause 1 of sec. 183, Revised Code, means before the commencement of the trial. Plaintiff is not entitled to move for a non-suit during the course of the trial.—*Empire Co. v. Herrick*, 394.

Abandonment of Cause.—A motion by the plaintiff for a non-suit is not an abandonment of his cause within the meaning of clause 4 of sec. 183 of the Code.—*Id.*, 394.

PRINCIPAL AND AGENT.

Ratification.—If one would repudiate the acts of another who, without authority, has assumed to contract for him, he must repudiate them *in toto*. Ratification of any part of the transaction ratifies it as a whole. One assuming to act for plaintiff, but without authority, sold to defendants, in plaintiff's absence, certain real property, and obtained from defendants a sum of money which was applied upon certain encumbrances upon the property, and other moneys which by the terms of the purchase were in full of the sum for which defendants were accountable to plaintiff. Plaintiff's wife and another, at the same time, executed to defendants a bond conditioned for the conveyance of the property. Plaintiff upon returning to his home assented to the transaction, and to defendant's possession and occupancy of the premises, received and retained what had been paid, and though, later, complaining of the conduct of the agent, and repudiating the bond, promised to protect plaintiffs in their purchase. Held a ratification of the sale, and, whether as effected by the oral dealings with the broker, or under the bond, was immaterial; that defendants were entitled to specific performance.—*Fishback v. Vining*, 419.

PUBLIC OFFICERS.

Liability to County for Fees Collected.—Prior to the Salaries Act (Laws 1891, 307) a public officer was entitled to all the fees and emoluments of his office. Under sec. 22 of that act (Rev. Stat., sec. 2554) as modified by sec. 15, art. 14 of the constitution, the fees collected by the officer up to the amount of his salary belong to him. He is required to pay into the county treasury only the surplus.—*Price v. Kit Carson County*, 315.

—*Liability for Failure to Collect or Tax Fees.*—No statute renders a county judge liable to the county for fees which he has not collected; nor is he liable for the mere failure to tax fees for services rendered. He is only liable under the statute for a failure to collect. The provisions of sec. 23 of the Salaries Act (Laws 1891, 314, Rev. Stat., sec. 2550) are to be

PUBLIC OFFICERS—Continued.

strictly construed. The penalty is not to be imposed in cases not within the statute, nor beyond the limit prescribed.—*Id.*, 315.

Fees Collected for Services Rendered Under the Acts of Congress.—Under sec. 15, art. XIV of the constitution, immediately upon the taking effect of the Salaries Act (Laws 1891, 307), the salary prescribed by law for the officers therein named became the sole compensation of the officer. Everything above the amount of his salary received by the officer for services performed in his official capacity it was his duty to turn into the county treasury.—*Glaister v. Kit Carson County*, 326.

A judge of the county court is liable to account to the county for fees received by him under the authority of the acts of Congress, for oaths administered, affidavits taken, and proofs made before him, in his official capacity, relating to the entry of public lands, even though such services could not have been compelled, nor the officer required to exact or collect the fee. That the fee prescribed by the act of congress is less than that prescribed by the statute of the state is not material.—*Id.*, 326.

QUIETING TITLE.

1. *Nature of the Action.*—Bills to quiet the title to lands are properly classified as actions *in rem* or *quasi in rem*. They retain their equitable character though so enlarged by statute as to give the remedy to one out of possession. When the defendant appears and submits his title to the court each party is an actor, and both may fail.—*Empire Co. v. Herrick*, 394.

2. *Plaintiff's Title.*—The plaintiff is not required to show an indefeasible title.—*Webster v. Kautz*, 111.

A defendant who shows no title in himself will not be heard to raise objections to the title of plaintiff. *Foster v. Clark*, 21 Col. Ap., 192, followed.—*Empire Co. v. Ellis*, 393.

3. *Answer.*—The court may quiet title in defendant even though the answer prays no relief.

The answer is to be regarded as a cross-complaint.—*Empire Co. v. Herrick*, 394.

4. *Voluntary Non-Suit—Effect.*—A voluntary non-suit taken by plaintiff who has presented no title to the lands in controversy, in no manner deprives the court of jurisdiction to quiet the title of the defendant.—*Empire Co. v. Herrick*, 394.

RAILWAY COMPANIES.

Power to Change Route.—The power of a railway company to change its route is not an absolute one; nor can it be exer-

RAILWAY COMPANIES—Continued.

cised at will, and without regard to the rights of third persons who would be injured by the change.—*Ward v. Colorado Eastern Co.*, 332.

SET-OFF.

Bank and Depositor—Receiver.—The mutual liabilities of bank and depositor are to be set off against each other, and the depositor's right to the set-off is not impaired by the bank's insolvency.

Appellant was receiver of an insolvent bank. Appellee was a depositor therein, and had a credit at the date of the failure. He had previously executed his note to the bank for a larger amount. The bank had pledged this, with other negotiable paper, to another bank, as collateral security for a loan. Appellee, reserving his right of set-off, had paid this note to the pledgee bank, and certain of the collaterals pledged by the insolvent bank had been returned to the receiver. An order that the receiver should collect the collateral so returned, and make *pro rata* payment out of the proceeds, to the appellee and other depositors similarly situated, in proportion to their several deposits, was affirmed.—*Hall v. Burrell*, 278.

SPECIFIC PERFORMANCE.

Of Sale of Corporate Stock, allowed.—*Fishback v. Vining*, 419.

Decree—Directions as to Payment.—Bill for specific performance by vendee against vendor and another who had taken the title with notice. A decree in favor of the complainant made no provision as to whom payment should be made. The decree was modified so as to allow payment into court, if differences should arise between the two defendants, as to the disposition of the purchase money, and as so modified was affirmed.—*Pace v. O'Ne*, 254.

STATUTES.

1. **Construction.**—In the interpretation of a statute the legislative purpose and the objects sought to be accomplished by the enactment are to be always borne in mind. And it is not to be admitted that an unjust or unnatural consequence was contemplated by the legislature, unless this intention is too plain to admit of a doubt.—*Western Co. v. Golden*, 209.

And the court should not adopt an interpretation which produces absurd, unreasonable, unjust, or oppressive results, if such interpretation can be avoided.—*Id.*

In ascertaining the meaning of a statute substantially iden-

STATUTES—Continued.

tical with that of another state, the decisions of the courts of such state will be consulted.

Saving Clause.—An affidavit of the publication of the notice of a tax sale was not sufficiently verified under the statute in force at the time of the sale; but a subsequent statute, antedating the affidavit and with which it complied, was revoked. The latter statute repealed that in force at the date of the tax sale, but with a saving clause, that, "Nothing in this act shall * in any manner affect any * tax sale * suit * trial * appeal or other proceedings * brought or to be brought under * any law repealed by this act, * but the same shall be * prosecuted, adjudged and determined as provided by the laws in force before and at the time this act takes effect." Held that in view of this saving clause, the later statute was without effect to support the affidavit.—*Herr v. Graden*, 511.

A statute imposing what is in the nature of a penalty is strictly construed.—*Price v. Kit Carson County*, 315.

2. *Construed.*—Sec. 2583 of Mills' Statutes (Rev. Stat., sec. 3637), refers only to an execution out of the district court.—*Victor Co. v. Roerig*, 257.

The manifest purpose of the legislature in secs. 3884, 3885, Mills' Stat. (Rev. Stat., secs. 5708, 5709), was that the affidavits there required, deposited with the county clerk, should be a permanent and enduring record of the fact of the publication of the notice of the tax sale; that the affidavit of publication should be made by some person having a proprietary interest in the paper, and in the general control thereof, and of its policy. The words "printer" and "publisher" manifest this intent, and a mere salaried employee, like a type-setter or foreman, is not within the meaning of the statute.—*Herr v. Graden*, 511.

Secs. 4089, 4090, Rev. Stat. 1908, are *in pari materia*, and must be construed together.—*Id.*

See LIFE INSURANCE.

Waiver of Statute.—The parties to the contract of life insurance cannot by any prior or contemporaneous agreement waive the statutory institution against the defense of suicide by the insured.—*Modern Brotherhood v. Lock*, 409.

Repeal—Effect.—The repeal of a statute which has become a constituent part of a contract will not be construed as retroactive, unless the legislative intention that it should so operate is clearly shown.—*Modern Brotherhood v. Lock*, 409.

STATUTES.

Construed, Cited or Referred to—

- Rev. Stats., Sec. 951.—*International Co. v. Wagner*, 489.
 Rev. Stats., Sec. 1527.—*Bloomer v. Jones*, 404.
 Rev. Stats., Sec. 2409.—*King Solomon Co. v. Verna Co.*, 534.
 Rev. Stats., Sec. 2431.—*Roberts v. Scurvin Co.*, 120.
 Rev. Stats., Secs. 2550-2554.—*Price v. Kit Carson County*, 315.
 Rev. Stats., Secs. 2950-2951.—*Brooke v. Black*, 49.
 Rev. Stats., Sec. 3087.—*Modern Brotherhood v. Lock*, 409.
 Rev. Stats., Sec. 3142.—*Id.*
 Rev. Stats., Sec. 3160.—*Id.*
 Rev. Stats., Secs. 3226-3228.—*Monte Vista Co. v. Centennial Co.*, 366.
 Rev. Stats., Sec. 3264.—*Northern Colorado Co. v. Poupirt*, 563.
 Rev. Stats., Sec. 3608.—*Victor Co. v. Roerig*, 257.
 Rev. Stats., Sec. 3637.—*Id.*
 Rev. Stats., Sec. 3648.—*Id.*
 Rev. Stats., Sec. 4029.—*Clark Co. v. Centennial Co.*, 174.
 Rev. Stats., Sec. 4033.—*Id.*
 Rev. Stats., Sec. 4035.—*Id.*
 Rev. Stats., Sec. 4036.—*Id.*
 Rev. Stats., Secs. 4089-4090.—*Fleming v. Howell*, 382;
 Empire Co. v. Howell, 389, 584; *Empire Co. v. Saul*,
 605; *Lougee v. Beeney*, 603; *Empire Co. v. Mason*,
 612.
 Rev. Stats., Sec. 4210.—*King Solomon Co. v. Verna Co.*,
 528.
 Rev. Stats., Sec. 4306.—*Clark Co. v. Centennial Co.*, 174.
 Rev. Stats., Secs. 5708-5709.—*Herr v. Graden*, 511.
 Rev. Stats., Sec. 5713.—*Newcomb v. Henderson*, 167;
 Bloomer v. Cristler, 238; *Empire Co. v. Saul*, 605;
 Fleming v. Howell, 382; *Empire Co. v. Mason*, 612.
 Rev. Stats., Sec. 5727.—*Vandermeuler v. Burwell*, 486.
 Rev. Stats., Sec. 5733.—*Bloomer v. Cristler*, 238; *Fleming*
 v. Howell, 382; *Empire Co. v. Mason*, 612; *Empire*
 Co. v. Chapin, 538.
 Rev. Stats., Sec. 5785.—*Herr v. Graden*, 511.
 Rev. Stats., Sec. 7070.—*Deutsch v. Rohlfing*, 543.
 Rev. Stats., Sec. 7073.—*Lowrey v. Harlow*, 73.
 Rev. Stats., Sec. 7096.—*Deutsch v. Rohlfing*, 543.

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- Rev. Stats., Sec. 7120.—*Shore v. Wall*, 146; *Lowrey v. Harlow*, 73.
- Rev. Stats., Sec. 7122.—*Lowrey v. Harlow*, 73.
- Rev. Stats., Sec. 7240.—*Id.*
- Rev. Stats., Sec. 7274.—*Sholine v. Harris*, 63.
- Rev. Stats., c. 11.—*Toll v. Cobbey*, 244.
- Laws 1891, 307 (Salaries Act).—*Price v. Kit Carson County*, 315; *Glaister v. Kit Carson County*, 326.
- Laws 1903, c. 119.—*Modern Brotherhood v. Lock*, 409.
- Laws 1907, c. 111 (Rev. Stat., c. 11).—*Toll v. Cobbey*, 244.
- Laws 1907, c. 193, Sec. 74.—*Modern Brotherhood v. Lock*, 409.
- Laws 1911, c. 6, Sec. 20.—*Empire Co. v. Herrick*, 394.
- Laws 1911, c. 107, Sec. 6.—*Monte Vista Co. v. Centennial Co.*, 364.
- Laws 1911, c. 107, Secs. 3-4-5.—*Western Co. v. Golden*, 209.
- Rev. Code, Sec. 16.—*Toll v. Cobbey*, 244; *Empire Co. v. Herrick*, 394.
- Rev. Code, Sec. 38.—*Dalander v. Howell*, 386.
- Rev. Code, Sec. 41.—*Toll v. Cobbey*, 244.
- Rev. Code, Sec. 45.—*Empire Co. v. Howell*, 389; *Lougee v. Beeney*, 603; *Empire Co. v. Saul*, 605.
- Rev. Code, Sec. 56.—*Clark Co. v. Centennial Co.*, 174.
- Rev. Code, Sec. 67.—*Colorado Springs Co. v. Albrecht*, 201.
- Rev. Code, Sec. 81.—*Toll v. Cobbey*, 244; *Collins v. Bailey*, 149.
- Rev. Code, Sec. 82.—*Clark Co. v. Centennial Co.*, 174.
- Rev. Code, Sec. 84.—*Toll v. Cobbey*, 244.
- Rev. Code, Sec. 183.—*Norton's Estate v. McAlister*, 293; *Empire Co. v. Herrick*, 394.
- Rev. Code, Sec. 184.—*Id.*
- Rev. Code, Sec. 194.—*Ward v. Atkinson*, 134.
- Rev. Code, Sec. 241.—*Empire Co. v. Herrick*, 394.
- Rev. Code, Sec. 274.—*Empire Co. v. Mason*, 612.
- Rev. Code, Sec. 280.—*Fehringer v. Martin*, 634.
- Rev. Code, Sec. 422.—*Western Co. v. Golden*, 209; *Colorado Springs Co. v. Nugent*, 381; *Reyer v. Teare*, 172; *Hendrie v. Acorn Co.*, 417; *Fehringer v. Martin*, 634; *Monte Vista Co. v. Centennial Co.*, 364; *Monte Vista Co. v. San Luis Co.*, 376; *Casserleigh v. Spar Co.*, 426; *Burnham v. Grant*, 506.

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Rev. Code, Sec. 423.—*Western Co. v. Golden*, 209; *Hen-
drie v. Acorn Co.*, 417.

Rev. Code, Sec. 436.—*Id.*

STOREKEEPER. See **MERCHANT.**

SUMMONS.

Service by Publication.—Where on a bill to quiet title the decree goes by default, upon mere publication of the summons, in which Brooks is named as defendant, those claiming under Brooke are not affected unless there is evidence of the identity in fact of Brooks with Brooke.—*Bloomer v. Cristler*, 240.

The property of a non-resident equitable owner of shares may be attached, and in such case summons by publication suffices to authorize a judgment enforceable against the attached property.—*Toll v. Cobbey*, 244.

A decree upon substituted service of process, based on an affidavit which fails to give the postoffice address of defendant, or state that it was unknown to the affiant, is void.—*Empire Co. v. Howell*, 389; *Empire Co. v. Gibson*, 617.

An affidavit to secure publication of the summons in a civil cause, made by the attorney therein, or which fails to give the postoffice address of the defendant, no explanation being made for the failure of the plaintiff to make the affidavit, and no excuse for the omission to give the defendant's address, is not a compliance with the statute. (Rev. Code, sec. 45.)—*Lougee v. Beenev*, 603.

A judgment by default upon publication of the summons upon such an affidavit is a nullity and may be assailed collaterally.—*Id.*, 603.

The statute authorizing constructive service of the summons in civil actions must be strictly pursued. An affidavit by one not shown to be the attorney or agent of the corporation plaintiff, or which makes no mention of the postoffice address of the defendant, giving no excuse for the omission, is not a compliance with the statute. A decree given by default upon mere publication of the summons, upon such an affidavit, is without validity and may be assailed collaterally. A statement that the residence of the defendant is unknown is no excuse for the failure to give his postoffice address.—*Empire Co. v. Saul*, 605.

Affidavit.—A decree given by default, upon mere publication of the summons, upon an affidavit which fails to state the postoffice address of the defendant, or that it is unknown, and contains no direct statement of the non-residence of the defendant,

SUMMONS—Continued.

or of his concealment, or departure from the state, is without validity.—*Empire Co. v. Mason*, 612.

TAX TITLES.

Advertisement of Sale—Affidavit of Publication.—An affidavit of the publication of the notice of a tax sale conforming to the statute, is sufficient in form.—*Herr v. Graden*, 511.

Who May Verify.—The foreman of the publisher of a newspaper, in general charge of only the mechanical department, and whose duties extend merely to the insertion of advertisements, the manner in which they shall appear, the correct printing thereof, and the mailing of the paper to subscribers, but who is never in supervisory control of the paper, or its policy, is not the "printer" within the meaning of the statute (Mills' Stat., sec. 3884; Rev. Stat., sec. 5709). His affidavit is not to be accepted as evidence of the publication of the notice of a tax sale.

The affidavit, as to its authentication, must conform to the statute in force at the date of the sale.

Where at the date of the sale, the statute requires the affidavit to be made by a person designated, and transmitted to the treasurer immediately after the sale, an affidavit made by a different person, years afterward, under authority of a different and more favorable statute, will not be accepted.—*Id.*, 511.

In view of the saving clause in the Revenue Act of 1902 (Laws 1902, c. 3, sec. 237; Rev. Stat., sec. 5785), the amendment to the previous statute (Mills' Stat., sec. 3884) affected by sec. 160 of that amendment, is without effect as to a sale made prior to its enactment.—*Id.*, 511.

Void Deed.—A tax deed which shows upon its face that the land was struck off to the county on the day upon which it was first offered is void. *Bryant v. Miller*, 48 Colo. 192, followed.—*Newcomb v. Henderson*, 167.

A tax deed showing the sale of several non-contiguous tracts for a gross sum is void upon its face.—*Fleming v. Howell*, 382; *Vanderpan v. Pelton*, 357.

So, a deed based upon a sale to the county, and an assignment of the certificate by the county clerk more than three years after the date of the sale, no authority for such assignment being shown.—*Id.*, 167, 357; *Dalander v. Howell*, 386.

Or a deed based upon a sale to the county where it does not appear that the land was offered by the treasurer on any day previous to that on which it was sold.—*Id.*

Or a deed executed by the treasurer of the county in which the land was situate at the date of the sale, it appearing by the

TAX TITLES—Continued.

face of the deed that at the date thereof it lay in a different county.—*Id.*

Or a deed showing that the lands were offered on two different dates, not showing on which of the two the sale occurred.—*Id.*

A tax deed void on its face does not set in motion the five years statute of limitation.—*Bloomer v. Cristler*, 240; *Fleming v. Howell*, 382.

A treasurer's deed which recites that the treasurer, at a tax sale publicly held "on the 19th day of October, A. D. 1897," exposed the lands to public sale, that no bid was made for any part thereof, that having passed the lands for the time, he "reoffered it, until the last day of the sale he became satisfied that no more sales * * * could be effected, at such sale," and thereupon struck the lands off to the county, shows that the lands were sold to the county on the first day on which they were offered, and is void.—*Empire Co. v. Saul*, 605.

A tax deed omitting material recitations set down in the statutory form, e. g., that the lands had not been redeemed, is no evidence of title.—*Fleming v. Howell*, 382.

A tax deed which recites a sale to the county, that the land was offered on a day named, and offered and reoffered "from day to day," until the same day first named, is void.—*Empire Co. v. Howell*, 389.

A tax deed recited that the treasurer "on November 15 * * * at an adjourned sale begun and held on October 10," sold the lands afterwards described, to the county. Held to import that the lands were struck off to the county on the first day they were offered, and that the deed was void upon its face.—*Vandermeulen v. Burwell*, 486.

Deed Executed by Treasurer of Wrong County.—Subsequent to the tax sale the lands are transferred to another county. Only the treasurer of the latter county has authority to execute a tax deed upon such sale. A deed by the treasurer of the former county is void.—*Vandermeulen v. Burwell*, 486.

A treasurer's deed recited that the treasurer, "at a tax sale publicly held on the 19th day of October," exposed to sale the lands described therein "in substantial conformity with the statute." That no bid was offered for any of the lands, that the treasurer became satisfied that no sale of the lands could be effected and "did bid off at said sale," in the name of the county, all the said lands—a line in the printed form reciting that the treasurer passed the land for the time, and reoffered it on the

TAX TITLES—Continued.

last day of the sale, being stricken out. Held to show conclusively that the land was bid in by the county upon the first day upon which it was offered and that the deed was void upon its face.—*Empire Co. v. Howell*, 584.

A deed reciting that the treasurer on the 31st day of October, "at an adjourned sale begun and held on the 5th day of October," exposed to sale, in conformity with the statute, the lands described therein, that no bid was offered for any of the lands or any portion thereof, "exposed to sale and remaining unsold at said sale," and that * * * the treasurer "having passed such real property for the time, did offer and reoffer for sale from day to day until the 31st day of October, being the last day of the sale." Held that the deed either failed to show when the lands were first offered, or that they were not offered at all until October 31st, and the deed in either case was void on its face.—*Id.*, 584.

A treasurer's deed of lands sold for taxes, showing upon its face that the lands were offered upon only one day, and were on that day struck off to the county, is void.—*Empire Co. v. Gibson*, 617.

Void Deed—Taxes Paid to Be Recovered.—Where on bill to quiet title plaintiff claimed under a void tax deed the amount of taxes paid by him, and the interest and penalties prescribed by the statute should be ascertained by the court, and a decree in favor of defendant should be conditioned upon payment to the plaintiff of the amount so ascertained.

In an appeal from a decree omitting this condition the cause was remanded with directions to the court below to hear evidence, make the computation, and require payment of the amount within thirty days.—*Empire Co. v. Chapin*, 538.

Burden of Proof.—One claiming under a tax deed has the burden of proving the assessed value of the land, and if this exceeded \$250, whether the land was then occupied or vacant, and that notice of the time of redemption was given as required by the statute (3 Mills' Stat., sec. 3902a, Rev. Stat., sec. 5727). Failing to give evidence of these matters the deed must be excluded.—*Vandermeulen v. Burwell*, 486.

Lands Assessed Jointly and Sold in Parcels.—The sale in parcels of a body of land assessed as a whole is a violation of the statute (Mills' Stat., sec. 3888, Rev. Stat., sec. 5713). One contesting the sale is not required to prove that he has sustained damage by this violation of the statute.—*Newcomb v. Henderson*, 167.

TIME.

Reasonable Time. See **CONTRACTS.**

TRIALS.

Questions for the Court.—The construction of a contract, though in parol, is for the court.—*Bullock v. Lewis*, 449.

Questions for the Jury.—Only in a very clear case should the court charge that a given state of facts is negligence in law. In an action against a manufacturing company and a railway company, charging joint negligence in erecting and maintaining upon the premises of the former a pole in such proximity to certain railway tracks as to endanger the lives of those operating cars thereon, and the operation and switching of cars thereon by the railway company at the request of the manufacturing company, occasioning the death of a brakeman, it was held that the evidence did not justify a charge that the erection of the pole, or allowing it to remain in such proximity to the track, was negligence *per se*.—*Great Western etc. Co. v. Parker*, 18.

The instruction was held especially injurious to the railway company in view of the undisputed fact that it had nothing to do with the erection of the pole, and there was no evidence of any right on its part to remove it.—*Id.*

Reference in the instruction to the fact that the pole was "not a necessary part of or an appliance or convenience or connection in the use of the track," was held to plainly tend to the prejudice of the railway company.—*Id.*

The negligence charged against the master in respect of defects in the place of employment, the obviousness of the danger, and whether the servant knew of it, are questions for the jury.—*Id.*, 18.

In an action for an injury attributed to the negligence of defendant's servant in driving a team and colliding with plaintiff while riding a bicycle upon the public streets, an instruction that "it was plaintiff's duty, at his peril, to keep out of the way of defendant's team in case they should be suddenly turned to the right" would be a clear usurpation of the province of the jury.—*Coors v. Brock*, 470.

So, an instruction that the "swerving of defendant's team to the right, in stopping, would be justifiable, though plaintiff was riding by his side."—*Id.*

So, an instruction which exonerates the driver, if he "did not know" of plaintiff's situation, in time to have avoided the collision, omitting the qualification that the driver, by due care, might have known of it.—*Id.*

In an action for the death of live stock, attributed to negli-

TRIALS—Continued.

gence in the operation of a railway train, the plaintiff produces sufficient competent evidence to sustain his allegations; the case must be submitted to the jury.—*Atchison Co. v. Gumaer*, 495.

Contributory negligence is ordinarily a question for the jury.—*Colorado Springs Co. v. Simmons*, 303.

What is reasonable time is for the jury, under proper instructions.—*Bullock v. Lewis*, 449.

Where it is claimed that plaintiff might by reasonable effort have prevented or reduced the damages of which he complains, the question is to what was reasonably required of him, under the circumstances, is for the jury.—*Northern Colorado Co. v. Poupirt*, 563.

General Finding.—A general finding upon the issues raised by the complaint and answer may sustain a decree in favor of plaintiff, even though there is no finding upon the issues presented by a cross-complaint.—*Pace v. Cline*, 254.

WAIVER.

Waiver of a legal right results only from some unequivocal act, manifesting the purpose, or conduct amounting to an estoppel.—*Hall v. Beymer*, 271.

WATER RIGHTS.

Nature of the Right.—A water right is gained by appropriation, and is usufructuary in character. The appropriator has no property in the channel of the stream, nor in the water of the stream as it flows naturally therein. The water right is distinct from the ditch or other structure by which the water is conveyed. A water right is a freehold in land.—*Monte Vista Co. v. Centennial Co.*, 364.

— **Change of Point of Diversion.**—The right of the appropriator to change the point of diversion existed before the statute, and in this state has always been recognized. It is a property right, qualified by the condition that the change shall not injuriously affect the vested rights of others. The public officers charged with the distribution of water are not permitted to recognize this right, or change the point of diversion in any case until permission is granted by the proper court.—*Monte Vista Co. v. Centennial Co.*, 364.

See **IRRIGATION**.

WILLS.

Probate—Effect.—The probate of a will relates to the death of the testator, prevents intestacy as to whatever is devised thereby, and is conclusive of the legality and validity of the

WILLS—Continued.

testament, as against all the world.—*Deutsch v. Rohlfing*, 543.

Posthumous Child—Abatement of Legacies.—Testator leaving a widow and one child devises all his estate to his widow, not expressing any intention to disinherit an after-born child. A child is born after his decease. The posthumous child takes one-fourth of the lands whereof the testator died seized. (Mills' Stat., Sec. 4659, Rev. Stat., Sec. 7073.)—*Lowrey v. Harlow*, 73.

WITNESSES.

Competency—Lawyer and Client.—The statute (Rev. Stat., Sec. 7274), was intended to protect the client against the publication by the attorney of confidential communications made by the former to the latter. Where the client voluntarily testifies as to such matters, the attorney may be examined in relation thereto.—*Sholine v. Harris*, 63.

An attorney is a competent witness in behalf of his client in the very cause which he prosecutes or defends.—*Id.*

Party Calling May Contradict.—A party calling a witness may not impeach his veracity, but is not precluded from producing other witnesses whose testimony conflicts with or contradicts his.—*Atchison Co. v. Gumaer*, 495.

False Testimony on One Point, does not warrant the rejection of the whole of the witness' testimony, uncorroborated, unless the falsehood was deliberate.—*Atchison Co. v. Gumaer*, 495.

WORDS AND PHRASES.

A bond for a deed of lands may be the "record title" upon which, under the statute, one claiming a homestead is required to inscribe her claim.—*Brooks v. Black*, 49.

"Or."—A conveyance of lands to a trustee named, "or his successor in trust" is not void for uncertainty. "Or" is construed as "and."—*Empire Co. v. Stratton*, 577.

"All fees, perquisites and emoluments."—*Glaister v. Kit Carson County*, 331.

I "do not remember" imports previous knowledge, and mere present absence of memory.—*Ward v. Atkinson*, 144.

"As far as applicable."—*Ward v. Colorado Co.*, 338.

"Abandon." An offer to submit to a non-suit is not an abandonment of the cause.—*Empire Co. v. Herrick*, 394.

"Before trial" means before the commencement of the trial.—*Id.*

"Showing," used in respect to the contents of a writing, imparts the construction placed upon the document by the one speaking or writing.—*Empire Co. v. Mason*, 616.

E. J. R.
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